85-2057

No. 85-

Supreme Court, U.S.
FILED
JUN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

vs.

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,

*Appellees.*

**On Appeal from the Court of Appeals of the State of New York**

## JURISDICTIONAL STATEMENT

*Of Counsel:*

ERNEST J. WILLIAMS
FREDERICK J. HUNZIKER, JR.
GARY SCHULLER
4 Irving Place
New York, N.Y. 10003
(212) 460-3572

MARK S. TULIS
230 Park Avenue
New York, N.Y. 10169
(212) 697-2371

MARTIN B. COWAN
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 530-5090

*Attorney for Appellant*

June 12, 1986

174 pp

## QUESTIONS PRESENTED

(1) Whether §744(1) of the New York Real Property Tax Law, as amended in 1982, which deprived appellant of a hearing on its claim that its real property was assessed at a substantially greater fraction of value than other real property in the same class, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

(2) Whether §744(1) of the New York Real Property Tax Law, as amended in 1982, which deprived appellant of a hearing on its claim that the appellee State Board of Equalization and Assessment assessed appellant's real property in a manner contrary to law, violated the Due Process Clause of the Fourteenth Amendment?

## CORPORATE AFFILIATIONS

Appellant owns a partial interest in Honeoye Storage Corporation and Boundary Gas, Inc.

## LIST OF PARTIES

The following municipalities in the State of New York are intervenors in these proceedings:

City of Mount Vernon
City of New Rochelle
City of New York
City of Peekskill
City of Rye
City of White Plains
Town of Bedford
Town of Eastchester
Town of Greenburgh
Town of Harrison
Town of Mamaroneck
Town of Mount Kisco
Village of Ardsley
Village of Briarcliff Manor
Village of Bronxville
Village of Elmsford
Village of Larchmont
Village of Mamaroneck
Village of Mount Kisco
Village of Ossining
Village of Pelham
Village of Pleasantville
Village of Port Chester
Village of Scarsdale

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| CORPORATE AFFILIATIONS | ii |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| JURISDICTIONAL STATEMENT | 1 |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 3 |
| STATEMENT OF THE CASE | 3 |
| 1. New York Real Property Tax Procedures | 4 |
| 2. Proceedings Prior to the 1982 Amendment | 5 |
| 3. The 1982 Amendment and Proceedings Thereafter | 7 |
| THE CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL | 9 |
| 1. Because there is only one class of property under New York law, the Equal Protection Clause requires equality of assessment | 10 |
| 2. The Legislature may not deprive a taxpayer of a hearing on its Equal Protection claim | 12 |
| 3. The 1982 amendment did not merely change a rule of evidence, but denied appellant its constitutional right to a hearing | 14 |
| 4. Appellant also has a Due Process right to a hearing on its claim that the State Board failed to adhere to the applicable statutory standards | 16 |
| 5. Summary | 18 |
| CONCLUSION | 18 |
| APPENDIX | A-i |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **CASES:** | |
| *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937) | 12 |
| *Baltimore & O. Ry. v. United States*, 298 U.S. 349 (1936) | 12 |
| *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930) | 11, 14 |
| *Canigiani v. Board of Assessors*, 98 A.D.2d 233, 471 N.Y.S.2d 95 (2d Dept. 1983) | 10 |
| *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) | 2 |
| *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915) | 12 |
| *Colt Industries v. Finance Administrator*, 81 A.D.2d 777, 439 N.Y.S.2d 24 (1st Dept. 1981), *modified*, 54 N.Y.2d 533, 446 N.Y.S.2d 237, 430 N.E.2d 1290 (1982) | 10, 15 |
| *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) | 2 |
| *Friarton Estates Corp. v. City of New York*, 525 F.Supp. 1250 (S.D.N.Y. 1981), *rev'd on other grounds*, 681 F.2d 150 (2d Cir. 1982) | 9 |
| *Goldberg v. Kelly*, 397 U.S. 254 (1970) | 12 |
| *Goss v. Lopez*, 419 U.S. 569 (1975) | 12 |
| *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946) | 11, 12 |
| *ICC v. Louisville & N. Ry.*, 227 U.S. 88 (1913) | 12 |

Page

*J.A. Green Construction Corp. v. Finance Administration*, 56 N.Y.2d 369, 452 N.Y.S.2d 369, 437 N.E.2d 1126 (1982) ..... 10

*Jamaica Water Supply v. State Board*, 196 N.Y. 39, 89 N.E. 581 (1909) ..... 11

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) ..... 14

*Londoner v. Denver*, 210 U.S. 373 (1908) ..... 12, 13

*Long Island Railroad v. State Board*, 104 Misc. 234, 171 N.Y.S. 784 (Sup. Ct., Kings Co. 1918), *modified*, 193 App. Div. 297, 183 N.Y.S. 733 (2d Dept. 1920), *rev'd*, 231 N.Y. 221, 131 N.E. 896 (1921) ..... 11

*Metropolitan Street Railway v. State Board*, 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd*, 199 U.S. 1 (1905) ..... 11

*Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937) . 12

*Oregon R.&N. Co. v. Fairchild*, 224 U.S. 510 (1912) ..... 12

*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) ..... 10

*Slewett & Farber v. Board of Assessors, County of Nassau*, 97 Misc.2d 637, 412 N.Y.S.2d 292 (Sup. Ct., Nassau Co. 1978), *modified*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dept. 1981), *modified*, 54 N.Y.2d 547, 446 N.Y.S.2d 241, 430 N.E.2d 1294 (1982) ..... 10, 15

Page

*Staten Island Edison Corp. v. Moore*, 6 Misc.2d 1031, 164 N.Y.S.2d 772 (Sup. Ct., Albany Co. 1955), *rev'd on other grounds*, 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dept. 1961), *on remand*, 37 Misc.2d 198, 238 N.Y.S.2d 443 (Sup. Ct., Albany Co. 1961), *aff'd*, 15 A.D.2d 983, 225 N.Y.S.2d 520 (3d Dept.), *aff'd*, 12 N.Y.2d 846, 236 N.Y.S.2d 624, 187 N.E.2d 475 (1962) ..... 11

*Stuart v. Palmer*, 74 N.Y. 183 (1878) ..... 14, 18

*Technicon Instruments Corp., Matter of, v. Assessor, Town of Greenburgh*, Index No. 19278/79, slip op. (Sup. Ct., Westchester Co. Feb. 26, 1985) (appeal pending) ..... 7

*Trustees of Union College, Matter of*, 129 N.Y. 308, 29 N.E. 460 (1891) ..... 14

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment ..... 3, *passim*

STATUTORY PROVISIONS:

28 U.S.C. §1257(2) ..... 2

New York Laws 1979, ch. 126, §1 ..... 15

New York Laws 1982, ch. 714, §24 ..... 3, *passim*

New York Real Property Tax Law, §102(12)(h) .. 4

New York Real Property Tax Law, §102(17) ..... 4

New York Real Property Tax Law, §606 ..... 4

New York Real Property Tax Law, §616(2) ..... 5

Page

New York Real Property Tax Law, §700-744 ..... 5

New York Real Property Tax Law, §720(3) ..... 5, 7

New York Real Property Tax Law, §744(1) ..... 1, *passim*

New York Real Property Tax Law, §1202(1) ..... 4, 11, 16

New York Real Property Tax Law, §1204-1218 ... 5

MISCELLANEOUS:

*Problems Relating to Taxation and Finance* 147-179, X Reports of New York State Constitutional Committee (1938) ..... 10

No. 85-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

vs.

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,

*Appellees.*

**On Appeal from the Court of Appeals of the State of New York**

## JURISDICTIONAL STATEMENT

In 1982, shortly before appellant's cause of action for the unequal taxation of its real property was to be tried, the New York Legislature amended §744(1) of the New York Real Property Tax Law retroactively denying appellant a hearing on the merits of its claim, and making the appellee's unilateral determination of the level of assessment "binding and conclusive" on appellant. Appellees then moved for summary judgment dismissing appellant's cause of action without trial of the issue. Appellant cross-moved for a declaratory judgment that the 1982 amendment was unconstitutional. Appellant appeals from the order of the New York Court of Appeals holding that the 1982

amendment denying appellant of its right to a hearing on the merits of its cause of action for unequal taxation did not violate the Fourteenth Amendment to the Constitution of the United States and dismissing appellant's cause of action.

## OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 67 N.Y.2d 783, 501 N.Y.S.2d 22, 492 N.E.2d 130 (1986). The opinion of the Appellate Division, Third Department, Supreme Court of New York, is reported at 103 A.D.2d 453, 480 N.Y.S.2d 789 (1984). The opinion of Special Term of the Supreme Court for Albany County is reported at 120 Misc.2d 617, 466 N.Y.S.2d 575 (1983). These opinions are reproduced at pp. A-1, A-6–13, and A-14–24, *infra*.[1]

## JURISDICTION

The Court of Appeals decision was issued on March 18, 1986. Appellant duly filed a Notice of Appeal to this Court with the Clerk of the Court of Appeals on June 7, 1986, and with the Clerk of Albany County of June 11, 1986. A-28–31. This Court has jurisdiction under 28 U.S.C. §1257(2).[2]

---

[1] References preceded by "A- " are to pages of the Appendix hereto.

[2] Appellant's pleadings raised two issues, overvaluation and inequality, for the years 1974 through 1977. The issues were bifurcated and the overvaluation issue was tried separately. For the year 1974, appellant has relinquished its claim based on overvaluation. The sole remaining matter for decision is appellant's motion for a declaratory judgment, which was denied by the order appealed from. Hence, the finality requirement of 28 U.S.C. §1257(2) is satisfied. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.3 (1978). The decision below is also final with respect to the remaining years because "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### *Constitution of the United States*

### *Fourteenth Amendment*

> Section 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### *State Statutes*

New York Real Property Tax Law §744(1), as amended by N.Y. Laws of 1982, ch. 714, §24 (49A McKinney's Consolidated Laws of New York (1984)):[3]

> §744(1) . . . Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue.

## STATEMENT OF THE CASE

Appellant, a New York public utility engaged in the purchase, manufacture, distribution and sale of electricity, gas and steam, brought 168 proceedings for the years 1974-1977 to reduce the real property tax assessments of its special franchise property in the City of New York and approximately 40 municipalities in Westchester County.[4] One of appellant's causes of action was for

---

[3] N. Y. Real Prop. Tax Law, 49A McKinney's Consolidated Laws of New York, is hereinafter cited as "RPTL".

[4] Additional proceedings are pending with respect to each of the subsequent years.

inequality, *i.e.*, that its property was assessed at a greater proportion of full value than other real property of the same class on the same tax rolls. A-51–56.

1. *New York Real Property Tax Procedures.*

Under the RPTL, "special franchise" property consists of the pipes, wires, poles, conduits, transformers and other tangible property used in the transmission and distribution of electricity, gas and steam located in the public streets, and the intangible right to place that property in the public streets. RPTL §102(17). Special franchise property is defined and taxed as real property and, as held by the courts below (see A-9), must be assessed at the same ratio applied to all other real property in a particular tax district. RPTL §§102(12)(h), (17).

The full value of a special franchise in each taxing district is determined by the appellee State Board of Equalization and Assessment ("State Board"). The State Board is also required to ascertain for each tax district an equalization rate, "as near as may be" equal to the ratio of the assessed value of all real property in that district to the fair market value of such real property.[5] The State Board then multiplies the full value of the special franchise property in each tax district by the equalization rate for that tax district, to determine a tentative assessment. RPTL §606.

The reason for this procedure is to assure uniformity of assessment for real property, all of which, including special franchises, is a single class for tax purposes. The New York courts in this case specifically acknowledged that "special franchises are to be assessed at a ratio equal to that being applied to other real property . . .", and that the 1982 amendment did not change the

---

[5] RPTL §1202(1)(a) provides:

> [T]he state board shall inquire into and ascertain as near as may be the percentage of full value at which taxable real property in such city, town or village is assessed, which percentage as finally determined as provided in this article shall be the state equalization rate for such roll.

continuing legislative "policy of equal ratio assessment between special franchises and other real property . . . ." A-9.

The equalization rate is determined in a proceeding separate and apart from the one to determine the assessment. Only the municipalities have the right to notice of, administrative hearing on, and judicial review of, the equalization rate. RPTL §§1204-1218.

Taxpayers are given advance notice of the tentative assessment and an opportunity to be heard on the issue of value, but not on the equalization rate, in the State Board's proceeding to review the tentative assessment. As conceded by the State Board, "the State Board has consistently not permitted any challenge to the equalization rate in hearings on the assessment of special franchise property." A-93. Thus, taxpayers are not allowed to introduce any evidence at any administrative hearing as to either the proper level of assessment or the accuracy of the equalization rate.

After the assessment becomes final, the State Board certifies the result to the local assessor, who enters that amount on the tax district's tax rolls "with the same force and effect as if such assessment had been originally made by such assessors." RPTL §616(2).

Under Article 7 of the RPTL, taxpayers have the right to judicial review of the assessment, on the grounds of overvaluation, inequality or illegality. RPTL §§700-744. Prior to 1982, RPTL §720(3) provided that all owners of real property could introduce three kinds of evidence to prove inequality: (i) appraisals of specific parcels selected by the parties or the court; (ii) actual sales of properties during the same tax year; and (iii) the state equalization rate.

2. *Proceedings Prior to the 1982 Amendment.*

Following the determination of the final assessments by the State Board in each of the years involved in this case, appellant commenced these proceedings in Special Term, New York Supreme Court, pursuant to RPTL Article 7, against the State

Board for reductions of the assessments, alleging, *inter alia*, overvaluation and inequality. A-51—56. Various municipalities, including the City of New York, moved to intervene in those proceedings affecting their respective jurisdictions. The 168 proceedings for 1974-1977 were consolidated, and the issues were bifurcated, with the causes of action for inequality to be tried and determined separately from the overvaluation issues.

In each of the proceedings involved in this appeal, appellant has repeatedly urged in support of its inequality claim that the equalization rates determined by the State Board were erroneous and excessive, in part because they were illegally, intentionally, and systematically increased by the State Board for political and other reasons, in utter disregard of the statutory standards. Nothing in the statute purports to delegate to the State Board any right to formulate policy, or to take into account the fiscal needs of the municipalities, the impact of the equalization rates on those municipalities, or any other possible consequences of the equalization rates.

The record contains numerous documents specifically supporting appellant's allegations. A-57—80. None of the appellees has ever denied the allegations of intentional, unauthorized distortions of, and other inaccuracies in, the equalization rates. To the contrary, in urging the Governor to sign the 1982 bill amending RPTL §744(1) to prevent future judicial review and retroactively abort pending actions for review, the State Board's counsel advised the Governor's counsel that "the equalization rate . . . cannot be defended in court." A-85.

In 1978, the State Board and several of the other appellees moved for partial summary judgment dismissing the portions of appellant's petitions alleging inequality on the grounds that special franchise owners did not have a cause of action for inequality. On June 2, 1981, the New York Court of Appeals held that owners of special franchise properties had the right to prove inequality of assessment and to challenge the acccuracy of the equalization rates. A-103. The Court adopted the opinion of the Appellate Division that:

> Our holding in this case will insure that special franchise owners have a meaningful opportunity to challenge the State equalization rates used in computing their assessments.

A-111.

That decision confirmed (1) that a special franchise holder could establish inequality of assessment by showing that the State Board erred in determining the equalization rate on either (a) legal grounds (e.g., because it failed to apply the proper statutory standard) or (b) factual grounds, and (2) that, regardless of whether the State Board's rate was determined in accordance with a methodology authorized by the statute, the taxpayer could show by actual sales or appraisals that the level of assessment was in fact lower than the equalization rate.[6]

3. *The 1982 Amendment and Proceedings Thereafter.*

On June 8, 1982, the trial judge set November 29, 1982 as the trial date on the inequality cause of action. On July 2, 1982, the New York Legislature passed, and on July 22, 1982, the Governor signed, an amendment to RPTL §744(1), effective as of January 1, 1973 for proceedings pending on the date of enactment, to provide as follows (N.Y. Laws 1982, ch. 714, §24):

> Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate . . . used in determining the

---

[6] Even if the State Board used a proper method to determine the equalization rate, the actual fraction of assessment is usually lower than the State Board's equalization rate because, among other reasons, the State Board uses market data only from prior years, whereas sales and appraisals to be offered as evidence in court under §720(3) have to be only for the current year. See, e.g., *Matter of Technicon Instr. Corp. v. Assessor, Town of Greenburgh*, Index No. 19278/79, slip op. (Sup. Ct., Westchester Co. Feb. 26, 1985) (appeal pending), reprinted at A-122, in which the equalization rate was found to exceed the actual level of assessment by as much as 76%.

> final special franchise assessment under review, and such equalization rate . . . shall be binding and conclusive on the parties upon any such issue.

There is no dispute that this legislation was intended to deny appellant a refund of taxes on the grounds of inequality. The Governor's bill jacket includes numerous items submitted by appellees and their counsel, and included in the record, urging the Legislature to overrule the Court of Appeals decision, lest they be forced to pay large tax refunds to appellant. A-46—47; A-83—91. The Appellate Division herein found that the purpose of the amendment "was to supersede the judicial determination that special franchise holders could contest the accuracy of equalization rates." A-7—8.

The result of this amendment was that appellant could no longer prove inequality either by showing that the State Board erred, legally or factually, or by introducing evidence of sales prices and appraisals of other parcels. The assessor's determination of the level of inequality has become "binding and conclusive" on the appellant merely because the assessor unilaterally made that determination, no matter how arbitrary, capricious or erroneous it may be. Or, as one of the appellee's counsel phrased it in a prior brief, the taxpapers are stuck with the assessor's calculation whether it is "good, bad or indifferent." Brief of Intervenors Westchester Municipalities at 20, *Consolidated Edison Co. v. State Board*, 73 A.D.2d 31, 425 N.Y.S. 2d 651 (3d Dept. 1980).

The Special Term herein held that, with respect to the 1982 amendment, "[T]he legislature has made clear its intention that a special franchise holder is not entitled to challenge their assessment on inequality grounds in a proceeding brought under article 7 of the Real Property Tax Law." A-20.

Similarly, the Appellate Division held that "a special franchise holder is precluded by the statutory amendment from challenging the accuracy of the equalization rate, admittedly the most important aspect of an inequality cause of action . . .", and that the "issue is now settled: a special franchise holder is precluded

from judicially contesting the equalization rates."[7] A-8.

Following the 1982 amendment, appellees again moved to dismiss appellant's claims of inequality, on the grounds that there was no way appellant could now prove inequality. A-32–38. Appellant agreed that the amendment had foreclosed the only evidence available to show either that the State Board's equalization rate was legally or factually wrong, or otherwise that its property was assessed at a higher proportion of value than that of other real property owners. Accordingly, appellant moved for an order nullifying the 1982 amendment on the grounds that it denied appellant Due Process and Equal Protection under the Federal and State Constitutions. A-39–50.

The trial court held in favor of appellees on all issues and summarily dismissed the portions of appellant's pleadings on inequality. A-14–27. The Appellate Division and the Court of Appeals both affirmed. A-1–13.

Thus, appellant has been denied any right whatsoever to offer evidence and be heard on what the state court agreed was "admittedly the most important aspect of an inequality cause of action. . . ." A-8.

## THE CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL

In New York, there has been a pattern of legislation over the years, often dressed in the form of restrictions on pleadings and evidence, designed to make it difficult, if not impossible, for taxpayers to prove inequality. Many of those provisions have previously been held unconstitutional.

In *Friarton Estates Corp. v. City of New York*, 525 F.Supp. 1250, 1256, n.15 (S.D.N.Y. 1981), *rev'd on other grounds*, 681 F.2d

---

[7] Although the court indicated that judicial review on the inequality claim was not entirely precluded, it recognized that such review was limited to obviously insignificant issues (e.g., clerical mistakes). Special Term referred to the possibility that there might be other proceedings in which appellant might move to intervene. It is not clear whether the Appellate Division agreed with this suggestion. In any event, appellant did not have any right to notice of such other hearings, intervention would be entirely discretionary and, to the best of its knowledge, there was none.

150 (2d Cir. 1982), the District Court, reviewing the entire subject of inequality in New York, stated:

> [T]hose interested in seeing how such an issue can confute the bench and bar, and subvert the administration of justice should see Real Prop. Tax L. §§306-07, 720-21, 1250-54 and *Slewett & Farber v. Bd. of Assessors*, 438 N.Y.S.2d 544, 549-55 (App. Div. 2d Dept. 1981).

Justice Murphy in *Colt Industries Inc. v. Finance Administrator*, 81 A.D.2d 777, 780, 439 N.Y.S.2d 24, 27 (1st Dept. 1981) (dissenting opinion), *modified*, 54 N.Y.2d 533, 446 N.Y.S.2d 237, 430 N.E.2d 1290 (1982), commented with respect to a related provision:

> [T]he 1979 amendment [to RPTL §720(3)] may not be viewed in a vacuum. That amendment was clearly part of a legislative effort to forestall the consequences of [inequality] . . .

See, also, *Canigiani v. Board of Assessors*, 98 A.D.2d 233, 471 N.Y.S.2d 95 (2d Dept. 1983) (holding RPTL §720(3) unconstitutional as applied therein); *Slewett & Farber v. Board of Assessors*, 97 Misc.2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau Co. 1978), *modified*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dept. 1981) (holding former RPTL §§307 and 721 unconstitutional), *modified*, 54 N.Y.2d 547, 446 N.Y.S.2d 241, 430 N.E.2d 1294 (1982); *J.A. Green Construction Corp. v. Finance Administration*, 56 N.Y.2d 369, 452 N.Y.S.2d 369, 437 N.E.2d 1126 (1982); *Problems Relating to Taxation and Finance* 147-179, X Reports of New York State Constitutional Committee (1938).

The 1982 amendment to §744(1) was but another part of the legislative effort to frustrate the Due Process and Equal Protection rights of real property owners.

1. *Because there is only one class of property under New York law, the Equal Protection Clause requires equality of assessment.*

In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), this Court held that the Equal Protection Clause required

that taxpayers within the same class had a right to be taxed equally, even if it was necessary to reduce their assessments in violation of other statutory provisions.

Subsequent cases have recognized that legislatures have broad discretion to classify taxpayers and tax different classes differently. The only question in such cases is whether the legislatures have in fact created classifications. Where such classifications have not been established, the *Sioux City* requirement of equal treatment for taxpayers similarly situated still applies. *E.g., Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946); *Brinkerhoff-Faris Co. v. Hill* 281 U.S. 673 (1930).

In this case, the state courts have ruled definitively that the state statutes created only one class of real property for tax purposes during the years here in question. That conclusion is wholly supported by close to 100 years of judicial interpretation and administrative practice. See, e.g., *Metropolitan Street Railway v. State Board*, 174 N.Y. 417, 438-439, 449, 67 N.E. 69 (1903), *aff'd*, 199 U.S. 1 (1905); *Jamaica Water Supply Co. v. State Board*, 196 N.Y. 39, 89 N.E. 581 (1909); *Long Island Railroad v. State Board*, 104 Misc. 234, 171 N.Y.S. 784 (Sup. Ct., Kings Co. 1918), *modified*, 193 A.D. 297, 183 N.Y.S. 733 (2d Dept. 1920), *reversing modification*, 231 N.Y. 221, 131 N.E. 896 (1921); *Staten Island Edison Corp. v. Moore*, 6 Misc. 2d 1031, 164 N.Y.S.2d 772 (Sup. Ct., Albany Co. 1955), *rev'd on other grounds*, 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dept. 1961), *on remand*, 37 Misc. 2d 198, 238 N.Y.S.2d 443 (Sup. Ct. Albany Co. 1961), *aff'd*, 15 A.D.2d 983, 225 N.Y.S.2d 520 (3d Dept.), *aff'd*, 12 N.Y.2d 846, 236 N.Y.S.2d 624, 187 N.E.2d 475 (1962). The State Board's counsel conceded that the Legislature has always intended that the State Board assess special franchise property at the same proportion of value as other real property. A-81.

The courts below firmly rejected the possibility that the 1982 amendment created a separate class for special franchise property. Moreover, the state equalization rate used in special franchise cases is still computed by treating all real property as a single class. RPTL §1202(1). Therefore, appellant has a continuing right under the Equal Protection Clause (and the equivalent state constitutional provision) to have its real property assessed at the same level as all other real property.

2. *The Legislature may not deprive a taxpayer of a hearing on its Equal Protection claim.*

Notwithstanding the existence of only a single class of real property, the State Board intentionally and systematically discriminated against owners of special franchises. At no time did the State Board give such property owners an administrative hearing on the issue of equalization rates or the level of assessments. Thus, when this action started, appellant's only right under New York law to show in a meaningful way that the State Board had assessed special franchises at excessive levels was by way of judicial review.[8] During the pendancy of the action, however, the Legislature retroactively destroyed even this right.

In *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), a virtually identical situation arose. The only substantive issue was the proper fraction of value at which the taxpayer's property was to be assessed. The right to a hearing on this issue was destroyed retroactively by the decision of the state's highest court, overruling prior law as to the proper procedure for protesting the assessment, after the time had expired for taking the newly required procedural steps. In an opinion by Justice Brandeis, this Court unanimously reversed the state court:

> We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law — using that

---

[8] A meaningful hearing is one in which the taxpayer receives reasonable notice and may introduce evidence, and in which that evidence is considered on the merits with respect to the important issues in controversy. *E.g.*, *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937); *Londoner v. Denver*, 210 U.S. 373 (1908); *ICC v. Louisville & N. Ry.*, 227 U.S. 88 (1913); *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937); *Oregon R.&N. Co. v. Fairchild*, 224 U.S. 510 (1912); *Baltimore & O. Ry. v. United States*, 298 U.S. 349 (1936); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Goss v. Lopez*, 419 U.S. 565 (1975). A hearing restricted to the trivial aspects of the assessment (see footnote 7, *supra*, p. 9) does not satisfy these requirements. Nor would a mere discretionary right to intervene in a proceeding commenced by a municipality satisfy Due Process requirements, especially when no such opportunity ever materialized. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915); *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946).

term in its primary sense of an opportunity to be heard and to defend its substantive right.

*First.* It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. . . .

. . . .

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction . . . . [T]he judgment deprives the plaintiff of its property.

*Second.* If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . .

. . . .

. . . Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

281 U.S. at 678-682.

Similarly, in *Londoner v. Denver*, 210 U.S. 373, 385 (1908), another inequality case, this Court held:

> [W]here the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard . . . .

Other inequality cases to the same effect are *Stuart v. Palmer*, 74 N.Y. 183, 190 (1878) ("The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing."), and *Matter of Trustees of Union College*, 129 N.Y. 308, 313, 29 N.E. 460 (1891) ("[A] legislature cannot arbitrarily determine the amount, refusing to the person addressed a reasonable opportunity to be heard.").

In *Brinkerhoff-Faris, supra*, the Court thought it was incontrovertible that a legislature could not deprive a taxpayer of a right to a hearing with respect to its claim of unequal taxation. Yet that is precisely what has happened in this case: Section 744(1) does exactly what this Court said was "obvious[ly]" unconstitutional. *Brinkerhoff-Faris* is controlling.

3. *The 1982 amendment did not merely change a rule of evidence, but denied appellant its constitutional right to a hearing.*

The lower courts in this case attempted to avoid the force of the above decisions by characterizing the 1982 amendment as only a modification of a rule of evidence on the issue of inequality. But this merely exalted form over substance.

Appellant was disputing that the equalization rate as promulgated by the State Board properly measured the assessment ratio. To prevent appellant from obtaining refunds, the statute was hastily amended to provide that appellant could prove its case only by introducing as evidence the very rate it was disputing, without an opportunity to impeach it. It then became impossible to prove any inequality at all, no matter how flagrant it may have been. The statute destroyed the right to use the only evidence that could possibly have proved the claim, thereby destroying the claim itself. That this is unconstitutional is demonstrated by *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), where the Court stated that "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'"

As stated by the New York Court of Appeals in *Colt Industries v. Finance Administration*, 54 N.Y.2d 533, 545 446 N.Y.S.2d 237, 241, 430 N.E.2d 1290, 1294 (1982), *quoting Board of Commissioners of Excise v. Merchant*, 103 N.Y. 143 (1886), with respect to similar provisions:

> [A] "law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law". . . .

As soon as the statute was enacted, appellees moved to dismiss appellant's inequality causes of action because there was left no conceivable evidence for appellant to introduce. The lower courts granted their motion, thereby confirming that, following the amendment, there was no need for a trial. The purported "rule of evidence" destroyed any opportunity to prove inequality, and left no cause of action to try. Special Term ruled that, as a result of the 1982 legislation, "a special franchise holder is not entitled to challenge their assessment on inequality grounds . . ." A-20. Thus, the 1982 amendment was not just a matter of limiting the evidence at a trial — it disposed of the issue without trial.

Further support for the conclusion that this was not a genuine attempt to enact a rule of evidence is found in the fact that the Legislature had itself previously concluded that the equalization rate was a highly inaccurate measure of inequality — that it produced "spurious" and "counter-productive" results — and forbade its use for this purpose in other tax reduction proceedings.[9] In *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dept. 1981), *modified*, 54 N.Y.2d 547 446 N.Y.S.2d 241, 430 N.E.2d 1294 (1982), the Appellate Division of the New York Supreme Court held, in an analogous context:

> No rational explanation can support the availability to [only] one class of taxpayers of a State equalization rate which the Legislature has characterized as

---

[9] N.Y. Laws 1979, ch. 126, §1.

> 'spurious and counter-productive' . . . when inequality of tax burden is established by proof of the ratio at which all property has been assessed without regard to class.

80 A.D.2d at 209-210, 438 N.Y.S.2d at 562.

The purported rule of evidence in *Slewett & Farber* was deemed irrational even though its use was only discretionary. It use is obviously far more irrational here where it is mandatory and conclusive.

The sole reason for, and effect of, the 1982 amendment clearly was to prevent appellant from having a hearing on the merits of its claim of overassessment due to inequality. It simply clothed the substantive denial of a hearing in the guise of a procedural change of evidentiary rules. It is not a mere rule of evidence, but another part of the concerted effort "to forestall the consequences" of the Constitutional requirements of equalization and uniformity.

4. *Appellant also has a Due Process right to a hearing on its claim that the State Board failed to adhere to the applicable statutory standards.*

Even if the Legislature could have validly restricted proof of inequality to the State Board's equalization rate, appellant had a due process right to show that the State Board did not obey the statute, but deliberately, systematically and knowingly violated it in determining that equalization rate.

RPTL §1202 required the State Board to determine "as near as may be" the ratio of assessments to fair market value of all real property. The State Board has some limited discretion in how to accomplish this, but it may not ignore the standard altogether. As Special Term stated:

> The only discretion that the SBEA [State Board] may have is found in Section 1202 of the Real Property Tax Law. This section . . . grants to the SBEA the authority to "inquire into and ascertain as near as may be the

> percentage of full value at which taxable real property . . . is assessed" . . .
>
> . . . [T]he standard, "as near as may be", is clear . . . .

A-19 – 20.

Thus, the State Board has discretion as to how it can achieve the statutory objective, but it does not have any discretion to adopt a different objective, or to exercise legislative prerogatives. It had only one simple task to perform: to determine in good faith "as near as may be" what in fact the assessment ratio is in each community in the state.

In this case, after the State Board collected its data and tentatively ascertained the equalization rate, it then considered what impact that rate would have on the collection of municipal taxes. If that impact appeared to be adverse to the various communities affected, the State Board rejected the rate it had initially developed, and adjusted the data until the rate produced a satisfactory fiscal result. For example, the State Board might reject recent data and use older data, or weigh older data more than current data. Or it might add more appraisals to the data base, or remove sales data. The decision to use the new data or the old data, or to add more data or subtract data, or how to weigh each, was based not on whether the State Board believed such data to be more accurate, which would have been a permissible criterion, but on the perceived fiscal needs or other administrative problems of the municipalities, which was not. A-43; A-57 – 80.

In effect, the State Board legislated the amount of taxes payable by special franchise owners, a power which was not, and could not be, granted to it.

The 1982 amendment barred appellant from introducing proof that the State Board intentionally refused to act lawfully, within its defined powers, that it did not in good faith use the best data, and that it intentionally based its conclusions on considerations beyond its statutory authority and constitutional limitations.

5. *Summary.*

Regardless of whether appellant might actually prevail on a trial on the merits of its allegations, it had a constitutional right to be heard on the question of whether the State Board acted arbitrarily and unlawfully, or to show in some other manner that its property was assessed at levels substantially in excess of other real property in the same class.

As the New York Court of Appeals held in a prior tax apportionment case, *Stuart v. Palmer*, 74 N.Y. 183, 191-192 (1878):

> A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this.

In denying appellant a hearing on the merits in this case, Due Process and Equal Protection were denied.

## CONCLUSION

The decision below should be summarily reversed. Alternatively, probable jurisdiction should be noted.

Respectfully submitted,

ERNEST J. WILLIAMS
FREDERICK J. HUNZIKER, JR.
GARY SCHULLER
4 Irving Place
New York, New York 10003

MARK S. TULIS
230 Park Avenue
New York, New York 10169

*Of Counsel*

MARTIN B. COWAN
1 Chase Manhattan Plaza
New York, New York 10005

*Attorney for Appellant*

June 12, 1986

# APPENDIX

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion of The New York Court of Appeals ..... | A-1 |
| Order of the New York Court of Appeals ..... | A-2 |
| Order of the Appellate Division, Third Department ..... | A-4 |
| Opinion of the Appellate Division, Third Department ..... | A-6 |
| Opinion of Supreme Court, Albany County ..... | A-14 |
| Order of Supreme Court, Albany County ..... | A-25 |
| Notice of Appeal ..... | A-28 |
| Notice of Motion for Partial Summary Judgment . | A-32 |
| Affidavit of Carl Rosenbloom in Support of Motion for Partial Summary Judgment ..... | A-34 |
| Notice of Cross-Motion to Declare Real Property Tax Law §744(1) Unconstitutional ..... | A-39 |
| Affidavit of Mark S. Tulis in Support of Cross-Motion and in Opposition to Motion for Partial Summary Judgment ..... | A-41 |
| Exhibit A - Petition for Review of 1976 Assessment of Village of Pleasantville ..... | A-51 |
| Exhibit B - Memorandum Dated February 19, 1974 ..... | A-57 |
| Exhibit C - Memorandum Dated December 4, 1974 ..... | A-60 |

Page

Exhibit D -
Memorandum Dated August 7, 1977 ..... A-65

Exhibit E -
Memorandum Dated July 18, 1978 ..... A-69

Exhibit F -
Memorandum Dated June 14, 1979 ..... A-71

Exhibit G -
Letter Dated February 7, 1977 ..... A-73

Exhibit I -
Portions of Transcript of Hearing of September 15, 1978 ..... A-81

Exhibit O -
Letter Dated July 16, 1982 ..... A-83

Reply Affidavit of Mark S. Tulis in Support of Cross-Motion and in Opposition to Motion for Partial Summary Judgment ..... A-92

Exhibit S -
Certificate of Final Special Franchise Assessment ..... A-96

Affidavit of John P, MacArthur in Response to Reply Affidavit ..... A-97

Reply Affidavit of Michael Whiteman ..... A-100

Opinion of the New York Court of Appeals ..... A-103

Opinion of the Appellate Division, Third Department ..... A-105

Opinion of the Supreme Court, Albany County .. A-113

Opinion of Supreme Court, Westchester County in *Matter of Technicon Instruments Corp. v. Assessor, Town of Greenburgh* ..... A-122

## OPINION OF THE NEW YORK COURT OF APPEALS
## (67 N.Y.2d 783, 501 N.Y.S.2d 22, 492 N.E.2d 130)

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Appellant, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Respondent, and VILLAGE OF PLEASANTVILLE et al., Intervenors-Respondents. (And 167 Other Related Proceedings.)

Argued February 3, 1986; Decided March 18, 1986

### APPEARANCES OF COUNSEL

*Adlai S. Hardin, Jr., Martin B. Cowan, Mark S. Tulis* and *John Moss Hinchcliff* for appellant.

*Robert Abrams, Attorney-General (Michael S. Buskus, Robert Hermann* and *Peter H. Schiff* of counsel), for respondents.

*Michael Whiteman, Melvin H. Osterman, Jr.*, and *Jonathan P. Nye* for Village of Pleasantville and others, intervenors-respondents.

*Henry J. Smith* and *James G. Fine* for City of Mount Vernon and others, intervenors-respondents.

*Frederick A. O. Schwarz, Jr., Corporation Counsel (John P. MacArthur* of counsel), for City of New York, intervenor-respondent.

*Marvin S. Fink* for Village of Scarsdale, intervenor-respondent.

### OPINION OF THE COURT

Order affirmed, with costs, for the reasons stated in the opinion by Presiding Justice A. Franklin Mahoney at the Appellate Division (103 AD2d 453). Question certified answered in the affirmative.

Concur: Chief Judge WACHTLER and Judges MEYER, SIMONS, KAYE, ALEXANDER, TITONE and HANCOCK, JR.

## ORDER OF THE NEW YORK COURT OF APPEALS

*Remittitur*

COURT OF APPEALS
of the
STATE OF NEW YORK
*The Hon. Sol Wachtler, Chief Judge, Presiding*

3 No. 43

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

—v—

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Respondent,*

—and—

VILLAGE OF PLEASANTVILLE, et al.,

*Intervenors-Respondents.*

(& 167 other related proceedings)

*The appellant(s) in the above entitled appeal appeared by* Milbank, Tweed, Hadley and McCloy, Esqs.; Rosenberg and Tulis, Esqs. and Ernest J. Williams, Esq.; *the respondent(s) appeared by* Hon. Robert Abrams, Attorney General of New York; the intervenors-respondents appeared by Whiteman, Osterman and Hanna, Esqs.; Hon. Frederick A.O. Schwarz, Jr., Corporation Counsel; Marvin S. Fink, Esq.; and McCarthy, Fingar, Donovan, Drazen and Smith, Esqs.

*The Court, after due deliberation, orders and adjudges that the* order is affirmed, with costs, for the reasons stated in the opinion by Presiding Justice A. Franklin Mahoney at the Appellate Division (103 AD2d 453). Question certified answered in the affirmative. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock Concur.

*The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the* Supreme Court, Albany County

*there to be proceeded upon according to law.*

*I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.*

/s/ Donald M. Sheraw

*Donald M. Sheraw, Clerk of the Court*

*Court of Appeals, Clerk's Office, Albany,* March 18, 1986.

## ORDER OF THE APPELLATE DIVISION, THIRD DEPARTMENT

AT a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 4th day of September, 1984.

PRESENT:

HON. A FRANKLIN MAHONEY,
Presiding Justice,
HON. T. PAUL KANE,
HON. JOHN T. CASEY
HON. LEONARD A. WEISS.
HON. HOWARD A. LEVINE,
Associate Justices.

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

– against –

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Respondent,*

– and –

VILLAGE OF PLEASANTVILLE, et al.,

*Intervenors-Repondents.*

(And 167 Other Related Proceedings.)

ORDER 47251

The petitioner, Consolidated Edison Company of New York, Inc., having appealed from an order of the Supreme Court at Special Term (THOMAS J. LOWERY, JR., J.), entered September 29, 1983 in Albany County (which, in a proceeding pursuant to Article 7 of the Real Property Tax Law, granted respondent's motion for partial summary judgment on the inequality aspect of petitioner's claim and denied petitioner's cross motion to declare

a portion of section 744 of the Real Property Tax Law unconstitutional), and said appeal having been presented during the above-stated Term of this Court, and having been argued by Martin B. Cowan, Esq., of counsel for appellant, and Michael S. Buskus, Esq., of counsel for respondent State Board of Equalization and Assessment, and Michael Whiteman, Esq., of counsel for intervenor-respondent Village of Pleasantville, et al., and John P. MacArthur, Esq., of counsel for intervenor-respondent City of New York, and Henry J. Smith, Esq., of counsel for intervenor-respondent City of Mount Vernon, and submitted by Marvin S. Fink, Esq., of counsel for intervenor-respondent Village of Scarsdale, and, after due deliberation, the Court having rendered a decision on the 11th day of October, 1984 (opinion by HON. A. FRANKLIN MAHONEY, Presiding Justice), it is hereby

ORDERED that the order be affirmed, with one bill of costs.

ENTER

*/s/ Michael J. Novack*

Clerk

DATED AND ENTERED: October 12, 1984

## OPINION OF THE APPELLATE DIVISION, THIRD DEPARTMENT (103 A.D.2d 453, 480 N.Y.S.2d 789)

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Appellant, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Respondent, and VILLAGE OF PLEASANTVILLE et al., Intervenors-Respondents. (And 167 Other Related Proceedings.)

Third Department, October 11, 1984

### APPEARANCES OF COUNSEL

*Ernest J. Williams (Martin B. Cowan* on behalf of *Milbank, Tweed, Hadley & McCloy* and *Mark S. Tulis* on behalf of *Rosenberg, Tulis & Gaynin* of counsel), for appellant.

*Robert Abrams, Attorney-General (Michael S. Buskus* of counsel), for State Board of Equalization and Assessment, respondent.

*Whiteman, Osterman & Hanna (Michael Whiteman, Melvin H. Osterman, Jr.*, and *Jonathan P. Nye* of counsel), for Village of Pleasantville, intervenor-respondent.

*Frederick A. O. Schwarz, Jr., Corporation Counsel (John P. MacArthur* of counsel), for City of New York, intervenor-respondent.

*Marvin S. Fink* for Village of Scarsdale, intervenor-respondent.

*McCarthy, Fingar, Donovan, Drazen & Smith (Henry J. Smith* of counsel), for City of Mount Vernon and others, intervenors-respondents.

### OPINION OF THE COURT

MAHONEY, P.J.

Petitioner is a public utility and owner of numerous special franchises in the City of New York and the Counties of Westchester and Rockland. A special franchise is the right to

construct, maintain or operate mains, pipes and wires for conducting water, steam, electricity or gas in, under, above or upon a public street or other public place (see Real Property Tax Law, § 102, subd 17). For purposes of assessment and taxation, the value of the special franchise includes the value of the tangible property situated in, under, above or upon the public area. The State Board of Equalization and Assessment (SBEA) is vested with exclusive authority to assess the value of a special franchise (Real Property Tax Law, §600), which it accomplishes by applying the latest State equalization rate or special equalization rate to the full value of the franchise (Real Property Tax Law, § 606, subd 1). Petitioner commenced 168 proceedings against SBEA alleging that its special franchise assessments for the years 1974 through 1978 involving 44 taxing units, many of which have been allowed to intervene, have been unequal, overvalued and illegal. This appeal involves only the causes of action grounded on inequality.

Following consolidation of the proceedings, SBEA and various intervenors moved to dismiss the inequality causes of action on the ground that a special franchise holder cannot challenge the equalization rate. This court held that a special franchise holder could challenge the accuracy of equalization rates such that it could contest the assessment of special franchise property on the basis of inequality; the Court of Appeals affirmed (*Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 73 AD2d 31, affd 53 NY2d 975). Subsequently, the Legislature amended subdivision 1 of section 744 of the Real Property Tax Law to include the following language: "Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue" (L 1982, ch 714, § 24). The amendment was made applicable to any proceeding commenced on or after January 1, 1973 and not finally determined as of the July 22, 1982 effective date of the amendment (L 1982, ch 714, § 29); its purpose was to supersede the judicial determination that special franchise

holders could contest the accuracy of equalization rates (see Memorandum of the Assembly Rules Committee, NY Legis Ann, 1982, p 237).

SBEA moved, on the basis of the statutory amendment, for partial summary judgment dismissing the inequality causes of action. Petitioner cross-moved for a declaration that the amendment was unconstitutional. Special Term denied petitioner's cross motion and granted partial summary judgment as sought by SBEA (120 Misc 2d 617). This appeal by petitioner ensued.

When this matter was last before this court, the issue was whether, as a matter of statutory interpretation, a special franchise holder could contest the equalization rates. As a result of the amendment which is the subject of this appeal, that issue is now settled: a special franchise holder is precluded from judicially contesting the equalization rates. The issues on this appeal are whether such preclusion is constitutional and, if so, whether such preclusion can be applied retroactively.

Petitioner contends that the attempt to prevent special franchise taxpayers from challenging equalization rates constitutes a denial of due process. Initially, we note that the Legislature has not attempted to deny special franchise holders any means of review of equalization rates. Sections 608 and 610 of the Real Property Tax Law provide for administrative review of tentative special franchise assessments and, since a component of that figure is the equalization rate, such can be contested administratively (see *Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 73 AD2d 31, 34-35, *supra*). Moreover, the statutory amendment has not completely eliminated a special franchise holder's inequality cause of action. Subdivision 1 of section 606 of the Real Property Tax Law provides that "[i]n determining a special franchise assessment the state board shall apply the latest state equalization rate or special equalization rate *** to the full value of such assessment". Thus, while a special franchise holder is precluded by the statutory amendment from challenging the accuracy of the equalization rate, admittedly the most important aspect of an inequality cause of action, it could

use such a cause of action in the event that SBEA mistakenly applies an incorrect equalization rate or one which is not the latest rate.

Central to petitioner's constitutional arguments is its premise that a special franchise holder has a constitutional right to be assessed at a ratio equal to that being applied to other property holders. We find no support for this proposition. It is clear that special franchise property is of a different nature than other real property and the Legislature, by creating separate articles dealing with the assessment procedures for special franchises and real property generally, has recognized this distinction. It is true that the Legislature has determined that special franchises are to be assessed at a ratio equal to that being applied to other real property (Real Property Tax Law, § 102, subd 12, par [h]; § 305). However, this is a matter of legislative policy. The Legislature has also determined that the best means of assuring equality is to apply the latest equalization rate to the full value assessment figure (Real Property Tax Law, § 606, subd 1). It is of course true that due process requires that a taxpayer have a right to be heard. However, that right does not include an opportunity to judicially contest the merits of every legislative determination in the taxing statute. As a result of the 1982 amendment, the Legislature has determined that the equalization rate shall be conclusive as to the issue of the ratio of assessed valuation to the full value assessment figure. Since the Legislature has simply determined that the best procedural means by which its policy of equal ratio assessment between special franchises and other real property can be effectuated is by strict reliance on the equalization rate, and has not eliminated petitioner's right to judicial review generally, petitioner's due process rights have not been violated.

We also reject petitioner's equal protection challenge to the amendment. The Legislature has a great deal of freedom in creating classifications for purposes of taxation (*Matter of Long Is. Light. Co. v State Tax Comm.*, 45 NY2d 529, 535). The amendment does not result in special franchises being assessed at a ratio different from that of other real property in the taxing unit. Instead, it simply works a procedural change in the means

by which such equality shall be assured. The objective of equality and uniformity of taxation is clearly a legitimate governmental objective. In our view, the statutory amendment at issue is rationally related to such objective. First, as discussed earlier, special franchises are inherently different from other types of real property, and the Legislature has recognized this fact by enacting different assessing procedures for special franchises (Real Property Tax Law, art 6). Moreover, by mandating that evidence on the issue of equality is limited to the equalization rate, the Legislature has prevented the possibility that, through piecemeal litigation, different special franchise holders in a particular taxing unit will ultimately be assessed at different ratios. The statutory amendment assures that there will be no more than one judicial review of an equalization rate (Real Property Tax Law, § 1218)* and that the rate will be applied to all special franchises equally. Since the statutory amendment is rationally related to a legitimate governmental objective, petitioner's equal protection rights have not been transgressed (see *Matter of Slewett & Farber v Board of Assessors*, 80 AD2d 186, 205-208, mod 54 NY2d 547).

We also conclude that the statutory amendment does not involve an unconstitutional delegation of legislative power. The statutory amendment works no delegation of power at all. Section 1202 of the Real Property Tax Law directs SBEA to establish equalization rates and it has been recognized that SBEA has the expertise to determine such rates (see *Guth Realty v Gingold*, 34 NY2d 440). The fact that the equalization rates will be exclusive evidence of the issue of equality with regard to assessments of special franchises does not amount to a delegation of legislative power. Moreover, contrary to petitioner's contention, SBEA has not been delegated any power to set tax rates. SBEA only sets the equalization rates; the tax rates are set by the taxing units.

Petitioner's contention that the statutory amendment violates section 2 of article XVI of the New York State Constitution because it "authorizes and requires" assessment in excess of full

---

* We recognize that such judicial review is at the instance of the taxing unit and not a special franchise holder.

value is likewise without merit. The challenged statutes do not mandate that any particular equalization rate be set. If, in a particular case, the application of an equalization rate results in an assessment in excess of full value, the taxpayer could raise the point by way of an overvaluation cause of action.

Having concluded that the statutory amendment is not constitutionally infirm, we now turn to the issue of whether the Legislature's direction that it be effective retroactively is improper.

Petitioner contends that the Legislature's action in making the amendment to subdivision 1 of section 744 of the Real Property Tax Law retroactive in order to supersede this court's prior decision, as affirmed by the Court of Appeals, violated the doctrine of separation of powers. Contrary to petitioner's contention, this court's decision did not give petitioner a cause of action for a refund of taxes, nor did it establish that petitioner had a viable claim for a refund of taxes. This court simply held that, in the context of its cause of action for inequality, petitioner had a right to contest the equalization rates, *as a matter of statutory interpretation*. There had not yet been any determination that the equalization rates were inaccurate, no less a determination that petitioner was entitled to a refund. Thus, the statutory amendment did not deprive petitioner of any cause of action or substantive right granted to it by this court.

As a general rule, courts, including reviewing courts, are obligated to recognize and apply retroactive modifications of the laws involved in pending litigation (see *Gager v White*, 53 NY2d 475, 483, cert den *sub nom. Guertin Co. v Cachat*, 454 US 1086; *Robinson v Robins Dry Dock & Repair Co.*, 238 NY 271, 281, app dsmd 271 US 649; *Matter of Slewett & Farber v Board of Assessors*, 80 AD2d 186, 199-201, *supra*). Such retroactive legislation does not present a due process issue unless a final determination has been made by the judiciary regarding the rights of the parties (*Matter of Slewett & Farber v Board of Assessors, supra*). In the instant case, no such final determination had been made at the time the Legislature amended the statute. There had simply been a determination that, as a matter of statutory interpretation,

petitioner had a right to contest the equalization rates. In the meantime, and before any final determination was made regarding the rights of the parties, the Legislature simply clarified its position that it did not intend that special franchise holders could challenge equalization rates in an inequality cause of action. In our view, retroactive application of the statutory amendment does not violate petitioner's due process rights.

As a final point, petitioner argues that Special Term held that it could challenge equalization rates via a CPLR article 78 proceeding and that, therefore, Special Term should have converted this proceeding into a CPLR article 78 proceeding. Special Term, in discussing petitioner's remedies, noted that petitioner could seek to intervene in a CPLR article 78 proceeding brought by a municipality pursuant to section 1218 of the Real Property Tax Law challenging the equalization rates. Special Term went on to state that petitioner could petition for a declaratory ruling (State Administrative Procedure Act, § 202, subd 1, par [a]; § 204) and seek review of the declaratory ruling in a CPLR article 78 proceeding (State Administrative Procedure Act, §§ 204, 205). We disagree and hold that, since petitioner had no viable claim to litigate in a CPLR article 78 proceeding, Special Term need not have converted this proceeding.

Article 7 of the Real Property Tax Law is the exclusive procedure for review of real property assessments "unless otherwise provided by law" (Real Property Tax Law, § 700; *Niagara Mohawk Power Corp. v City School Dist.*, 59 NY2d 262, 268). No other provision in the Real Property Tax Law gives a special franchise holder the right to review equalization rates by way of an article 78 proceeding. Thus, petitioner cannot use an article 78 proceeding to challenge the accuracy of the equalization rates. Petitioner's application to declare section 24 of chapter 714 of the Laws of 1982 unconstitutional, as opposed to a challenge to the accuracy of the equalization rates, could have been the subject of a separate CPLR article 78 proceeding (see *Niagara Mohawk Power Corp. v City School Dist.*, 59 NY2d 262, 269, affg 88 AD2d 167, 168-169, *supra*). However, petitioner chose to make such claim the subject of a cross motion in this proceeding

and has had a full opportunity to litigate its contentions in this regard. Thus, no purpose would have been served by converting this proceeding into a CPLR article 78 proceeding.

KANE, CASEY, WEISS and LEVINE, JJ., concur.

Order affirmed, with one bill of costs.

## OPINION OF SUPREME COURT, ALBANY COUNTY, (120 Misc. 2d 617, 466 N.Y.S.2d 575)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Petitioner, v STATE BOARD OF EQUALIZATION AND ASSESSMENT et al., Respondents.

Supreme Court, Albany County, August 15, 1983

### APPEARANCES OF COUNSEL

*Wein, Lane & Malkin* (*Mark S. Tulis* and *Martin B. Cowan* of counsel), for petitioner. *Robert Abrams, Attorney-General* (*Carl F. Rosenbloom* of counsel), and *William Ryan* for respondent. *Allen G. Schwartz, Corporation Counsel* (*John P. MacArthur* of counsel), for City of New York, intervenor-respondent. *McCarthy, Fingar, Donovan & Glatthaar, Drazen & Smith* (*Henry J. Smith* of counsel), for City of Mount Vernon, intervenor-respondent. *Marvin S. Fink* for Village of Scarsdale, intervenor-respondent. *Whiteman, Osterman & Hanna* (*Melvin H. Osterman, Jr.*, and *Michael Whiteman* of counsel), for Town of Greenburgh and others, intervenors-respondents. *Frank DeBellis* for Town of Pelham, intervenor-respondent. *Maxwell E. Charat* and *Daniel Boddie* for City of New Rochelle, intervenor-respondent.

### OPINION OF THE COURT

THOMAS J. LOWERY, J.

In these proceedings brought pursuant to article 7 of the Real Property Tax Law to review certain special franchise assessments, the respondent, State Board of Equalization and Assessment (SBEA) and the various intervenors-respondents, move for an order granting partial summary judgment dismissing those portions of the petitions which seek to establish that the assessment valuations were erroneous by reason of inequality. The petitioner, Consolidated Edison Company of New York, Inc. (Con Ed), by

way of cross motion, seeks a determination and order declaring that subdivision 1 of section 744 of the Real Property Tax Law violates the New York State and Federal Constitutions and is void. The cross motion will be addressed first.

## HISTORY OF PROCEEDINGS

Con Ed is a public utility and is the holder of special franchises in the City of New York and the Counties of Rockland and Westchester. Maintaining that its special franchise assessments for the tax years 1974-1978 had been unequal, overvalued, and illegal, it commenced 168 proceedings against the SBEA.[1]

Soon thereafter, the SBEA and the various intervenors-respondents mounted challenges to those portions of Con Ed's petitions that alleged that the assessments were illegal and unequal. As a result, those portions of the petitions that were grounded in illegality were dismissed (see *Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 60 AD2d 356), while those portions grounded in inequality were found to present a triable issue of fact and were upheld. (See *Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 73 AD2d 31, aff'd 53 NY2d 975.) With respect to the latter, the court held that special franchises should be treated no differently than conventional real property and that both could resort to subdivision 3 of section 720 of the Real Property Tax Law to demonstrate the inequality of their assesments.[2]

In response to the court sustaining Con Ed's right to claim that their assessment was unequal, the Legislature amended subdivision

---

[1] The State Board of Equalization and Assessment is vested with exclusive authority to fix assessments for a special franchise (see Real Property Tax Law, § 600), and does so by using the latest State equalization rate or a special equalization rate. (See Real Property Tax Law, § 606.)

[2] Use of actual sales, select parcels, and the State equalization rate (other than in New York City and Nassau County).

1 of section 744 of the Real Property Tax Law. (L 1982, ch 714, §§ 24, 29.)[3] The amendment retroactively precluded a special franchise holder from resorting to subdivision 3 of section 720 of the Real Property Tax Law and restricted his proof to the equalization rate or special equalization rate used by the SBEA in determining the final special franchise assessment under review.

Upon the amendment becoming law, Con Ed brought this motion to have it declared unconstitutional on the grounds, *inter alia*, that it denied them equal protection and due process.

CONSTITUTIONALITY OF THE 1982 AMENDMENT

Con Ed's equal protection claim is based on the premise that the 1982 amendment did not work a substantive change, but was procedural of nature. Given this premise, Con Ed argues that inasmuch as special franchises and conventional real property comprise but a single generic class, they cannot be accorded different treatment. It is claimed that to do so runs afoul of both the Federal and State Constitutions. (US Const, 14th Amdt, § 1; NY Const, art I, § 11.)

Obviously, if the amendment were considered substantive, Con Ed's equal protection argument would necessarily fail. For it is to be noted that in the field of taxation, more than in any other field, the Legislature possesses the greatest freedom in classification. (*Matter of Tolub v Evans*, 58 NY2d 1; *Matter of Long Is. Light Co. v. State Tax Comm.*, 45 NY2d 529.) Certainly, when

---

[3] "In a proceeding to review a special franchise assessment . . . the court may take such evidence as it may deem necessary or may appoint a referee to take evidence and hear and determine all questions raised by the petition and the answer thereto. Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue". (Real Property Tax Law, § 744, subd 1 [L 1982, ch 714, § 24]). The foregoing amendment was made retroactive and applied to all proceedings commenced on or after January 1, 1973. (L 1982, ch 714 § 29.)

considering the unique nature of a special franchise (see *People ex rel. Metropolitan St. Ry. Co. v State Bd. of Tax Comrs.*, 174 NY 417), justification can easily be found for the Legislature's differential treatment. (See *Kentucky R.R. Tax Cases*, 115 US 321; *Rapid Tr. Corp. v New York*, 303 US 573; *Southern Ry. Co. v Watts*, 260 US 519.)

Turning to the merits of the argument, it is noted that prior to 1982 the Real Property Tax Law was not clear as to whether special franchise holders were to be treated differently than conventional real property owners who were seeking to challenge the inequality of their assessments. As a result, it was held that they were to be treated the same, and that subdivision 3 of section 720 of the Real Property Tax Law applied with equal force to a review of a special franchise assessment. (*Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 73 AD2d 31, aff'd 53 NY2d 975, *supra*.) The 1982 amendment clarified the Legislature's intent in this regard.

The 1982 amendment is procedural. Its object is to control evidence and, in so doing, to preclude holders of special franchises from collaterally attacking the equalization rate used by the SBEA in determining their assessments. No longer may interclass comparisons (see Real Property Tax Law, § 720, subd 3) be utilized to challenge such rate.

The question presented is whether, under the circumstances, the differential treatment if justified. This necessarily depends on the petitioner demonstrating there was no rational basis for the legislative action. (See *Matter of Slewett & Farber v Board of Assessors*, 80 AD2d 186, mod on app 54 NY2d 547.) That is to say, there existed no cognizable differences between special franchises and conventional real property that justified the differential treatment accorded.

In this regard, the petitioner's burden is a heavy one, since there exists a presumption that every statute is constitutional, and that the Legislature has investigated the subject and acted with reason.

(*Hotel Dorset Co. v Trust for Cultural Resources*, 46 NY2d 358; *Montgomery v Daniels*, 38 NY2d 41; *Matter of Malpica-Orisini*, 36 NY2d 568; *I.L.F.Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263.) This presumption is rebuttable, but unconstitutionality must be demonstrated beyond a reasonable doubt. (*Lighthouse Shores v Town of Islip*, 41 NY2d 7; *I.L.F.Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263 *supra; Wiggins v Town of Somers*, 4 NY2d 215; *Defiance Milk Prods. Co. v Du Mond*, 309 NY 537.)

The evidence presented here is clearly insufficient to demonstrate that Con Ed is denied equal protection of the law. Their argument is based on the assumption that no differences exist that would jusitfy differential treatment. This is plainly not the case. A special franchise is unique. It is neither land, nor an improvement of land. It is no single situs. For these reasons it has been considered *sui generis. (People ex rel, Metropolitan St. Ry. Co. v State Bd. of Tax Comrs.*, 174 NY 417, *supra.)* These differences have prompted special treatment in the past. For example, special franchises have procedurally been set apart from conventional real property. The latter is valued by local assessors, wherein the assessment valuation for special franchises is determined by the SBEA. (See Real Property Tax Law, § 600.) Also, special franchises have differed from conventional real property in the standard by which their assessment valuation is determined. At least until the 1981 amendment to the Real Property Tax Law (repealing Real Property Tax Law, § 306, and enacting § 305 [L 1981, ch 1057, § 1]), the local assessors were required by statute to assess real property at full value. (See *Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1.) In contrast, special franchise assessments were determined at a fraction of full value. (See Real Property Tax Law, § 606, subd 1.) Suffice it to say, if such differences justified procedural distinctions in the past, it is difficult to argue that they do not provide justification here.

Moreover, even had Con Ed's claim of equal protection been sustained, any right to resort to the evidentiary standards set forth in subdivision 3 of section 720 would appear to be a futile exercise. For such standards are irrelevant, since they are based upon

data obtained during the year in which the roll containing the assessment was completed, whereas the rate used by the SBEA was established in a prior year. (See *Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 112 Misc 2d 422.)

Next, Con Ed asserts that the 1982 amendment is unconstitutional in that it improperly delegates to the SBEA the function of equalizing special franchise assessments without providing adequate safeguards or standards. (See US Const, 14th Amdt, § 1; 5th Amdt; NY Const, art III, § 1; art XVI, § 2.)

In my opinion, this constitutional issue as advanced by the petitioner is insubstantial and does not require extended discussion. (See *Sunshine Coal Co. v Adkins*, 310 US 381; *RCA Communications v Federal Communications Comm.*, 238 F2d 24, cert den 252 US 1004; 1 Davis, Administrative Law Treatise [2d ed], p 174.) Neither subdivision 1 of section 744 of the Real Property Tax Law, as amended, nor subdivision 1 of section 606 of the Real Property Tax Law vests discretion in the SBEA with respect to formulating equalization rates. The latter section directs the SBEA to equalize special franchise assessments and advises them as to the precise manner that this is to be accomplished, i.e., "the state board shall apply the latest state equalization rate or special equalization rate". (Real Property Tax Law, § 606, subd 1.) Subdivision 1 of section 744 of the Real Property Tax Law is the Legislature's confirmation of the principle that it does not want the rates, the use of which it has prescribed, to be the subject of collateral attack in a proceeding to review a special franchise assessment.

The only discretion that the SBEA may have is found in section 1202 of the Real Property Tax Law. This section deals with the establishment of the State equalization rate and class ratios and grants to the SBEA the authority to "inquire into and ascertain as near as may be the percentage of full value at which taxable real property in such city, town or village is assessed". (Real Property Tax Law, § 1202, subd 1, par [a].) Once ascertained, it is to apply the resultant rates to the special franchise value. (See Real Property Tax Law, § 600.)

While it is true that the means to accomplish this calculation have been left to the SBEA, the standard "as near as may be" is clear and its sufficiency has been judged. (See *Matter of Colt Inds. v Finance Administrator of City of N.Y.*, 54 NY2d 533; *Matter of 860 Executive Towers v Board of Assessors*, 79 Misc 2d 821, affd 47 AD2d 603; *Pellaton Apts. v Board of Assessors*, 42 AD2d 847; *Guth Realty v Gingold*, 34 NY2d 440.)

Moreover, there are ample checks upon the SBEA's exercise of its limited role in ascertaining equalization rates. These will be addressed hereafter, when the due process issue is discussed.

Con Ed argues that even assuming that there was no improper delegation of legislative authority, the 1982 amendment denies them due process. (See US Const, 14th Amdt, § 1; NY Const, art I, § 6.) Specifically, it is claimed that the 1982 amendment deprived them of the right to obtain a judicial review of their assessment by precluding evidence that the equalization rate used by the SBEA in arriving at their assessment valuation did not reflect "as near as may be" the percentage of full value at which real property was assessed in the taxing unit. In sum, it is claimed that they were denied the right to demonstrate the inequality of their assessment.

The 1982 amendment is a procedural statute that supports section 606 of the Real Property Tax Law. It creates no presumptions, irrebuttable or otherwise. Its purpose, as stated, is to control evidence. In doing so, it restricts proof on the issue of inequality to the equalization rate used by the SBEA in determining the assessment valuation for a special franchise. Thus, the Legislature has made clear its intention that a special franchise holder is not entitled to challenge their assessment on inequality grounds in a proceeding brought under article 7 of the Real Property Tax Law.

Whether justification existed for the differential treatment accorded by the Legislature to special franchise holders is of no concern here. As stated, some conceivable justification for the Legislature's action did, indeed, exist. Our concern, rather, is whether, under the circumstances, Con Ed has a constitutional right to a *de novo* review of the equalization rate in an article 7 proceeding.

I am of the view that due process does not require such a review. The equalization rate is considered a legislative act and thus, no hearing, much less a full hearing, is constitutionally required. (See *Bi-Metallic Co. v Colorado*, 239 US 441; *Kentucky R.R. Tax Cases*, 115 US 321, *supra; State R.R. Tax Cases*, 92 US 575.) Moreover, the State Administrative Procedure Act, the provisions of which are applicable to the SBEA (*Matter of State Bd. of Equalization & Assessment v Kerwick*, 72 AD2d 292), lends support to this determination. The establishment of a rate is considered rule making (see State Administrative Procedure Act, § 102, subd 2, par [a], cl [ii]), rather than an adjudicatory proceeding. As such, it has been held that a municipality, which has standing to contest the rate, is not entitled to a formal adversarial hearing. (See *Matter of County of Nassau v State Bd. of Equalization & Assessment*, 80 AD2d 9.)

Even if it had been held otherwise, such a hearing would serve no useful purpose, since the SBEA's methodology in arriving at the rate has been universally accepted by the courts. (See *Guth Realty v Gingold*, 34 NY2d 440, *supra; Matter of 860 Executive Towers v Board of Assessors*, 79 Misc 2d 821, affd 47 AD2d 603; *Pellaton Apts. v Board of Assessors*, 42 AD2d 847, *supra*.)

Notwithstanding, Con Ed is not without a remedy. Avenues are available for Con Ed to question the rate. A complaint can be voiced in a proceeding brought under article 6 of the Real Property Tax Law (see Real Property Tax Law, § 608) and a hearing will be had thereon. (See Real Property Tax Law, § 612.) Moreover, Con Ed may seek to intervene in a CPLR article 78 proceeding brought by a municipality for a review of final determinations of the SBEA of the rate. (See Real Property Tax Law, § 1218; CPLR 7802, subd [d].) Finally, they may request notice of hearings conducted pursuant to section 1208 of the Real Property Tax Law and, if they desire, to petition for a declaratory ruling. (See State Administrative Procedure Act, § 202, subd 1, par [a]; § 204.) Such ruling may then be reviewed in an article 78 proceeding. (See State Administrative Procedure Act, §§ 204, 205.) Accordingly, Con Ed's due process claim must be rejected.

Finally, Con Ed attacks the 1982 amendment on the grounds that it violates their right to be assessed at no more than full value. (NY Const, art XVI, § 2.)

I find this argument to be equally unpersuasive. Where use of the State rate would produce such a result, the SBEA must adjust the rate, since any conflict between section 606 of the Real Property Tax Law and section 1 of article XVI of the New York State Constitution must be resolved in favor of the latter. Obviously, if the State failed to make such an adjustment, the resulting assessment could be challenged on "overvaluation" grounds.

## RETROSPECTIVE APPLICATION

Con Ed argues that despite a holding that the 1982 amendment is constitutional when prospectively applied, its retrospective application violates their constitutional right to due process and equal protection.

It is well settled that retrospective legislation is prohibited by neither the Federal nor the New York State Constitution (*Matter of Slewett & Farber v Board of Assessors*, 80 AD2d 186, mod on app 54 NY2d 547, *supra*), so long as it does not violate the general standards of due process and equal protection. (*Welch v Henry*, 305 US 134.)

Before analyzing Con Ed's specific claims, it is again well to note that they have the burden of rebutting the presumption of constitutionality that attaches to all legislative enactments. (*Borden's Co. v Baldwin*, 293 US 194; *Cook v City of Binghamton*, 48 NY2d 323.)

Insofar as Con Ed's due process claim is concerned, I am of the view that it has little merit. To succeed, Con Ed must demonstrate that application of the amended statute in these proceedings would deprive them of a vested right, or would otherwise be so harsh and oppressive as to constitute a violation of due process. (*Welch v Henry*, 305 US 134, *supra; Matter of Chrysler Props. v Morris*, 23 NY2d 515.) Neither has been established here.

Generally, a vested right connotes a concept of a present fixed interest, which in right, reason and natural justice should be protected against arbitrary action. (16 CJS, Constitutional Law, § 215.) It comprises elements of both due process and separation of powers. (*Matter of Slewett & Farber v Board of Assessors*, 80 AD2d 186, mod on app 54 NY2d 547, *supra.*)Con Ed's contention that it has been deprived of a vested right is based on the supposition that reliance upon the continued applicability of then-effective judicial declarations, to wit, the right of special franchise holders to contest their assessments on inequality grounds, constitutes a property right that cannot be abridged by subsequent legislation. Such a supposition must be rejected, for there is no such right as a vested right in existing legislation or rules of law that precludes a change or repeal by the Legislature. (*Matter of West*, 289 NY 423.) A right is not deemed vested unless it is something more than a mere expectation based on a continuation of the present general laws. (*Ten Ten Lincoln Place v Consolidated Edison Co.*, 190 Misc 174, affd 273 App Div 903.) In this regard, it is noted that had Con Ed's rights been finally adjudicated, something more than a mere expectation would have been presented. This would have been sufficient to support a finding that a vested right had been affected. (See *Matter of Slewett & Farber v Board of Assessors*, 80 AD2d 186, mod on app 54 NY2d 547, *supra; Matter of Green Constr. Corp. v Finance Administrator*, 56 NY2d 369.)

With respect to Con Ed's assertion that the substantive effect of the 1982 amendment is to impose a new tax, the same is without basis in law or fact. The taxes have already been imposed and have been paid by Con Ed. It should be noted, however, that there is always some substantive effect to the retrospective application of a statute. Here, it dashed any hope Con Ed had for a refund based on inequality grounds. The consequences, however, can hardly be considered harsh and oppressive. The test is one of reasonableness (see *Welch v Henry*, 305 US 134, *supra*), which certainly has been met here when considering the public interest served by the amendment vis-a-vis the nature of the alleged right affected.

Turning to Con Ed's equal protection argument, I find it unpersuasive. The suggestion that the retrospective application of the statute creates a two-tiered classified system of taxation, i.e., conventional real property owners and special franchises, and precludes special franchise holders the opportunity of demonstrating the inequality of their assessments for past years, while at the same time, allowing conventional real property owners the opportunity to do so, must be rejected. The argument advanced is no more than a rehash of what Con Ed had previously contended when addressing the amendment's prospective application. It was then my view that the treatment of special franchises as a separate class has not been shown to be either irrational or arbitrary. My view has not changed, for the equal protection analysis is the same, whether you are discussing a prospective or retrospective application of the statute. (See *Welch v Henry*, 305 US 134, *supra*.)

## CONCLUSION

In sum, the constitutionality of subdivision 1 of section 744 of the Real Property Tax Law (L 1982, ch 714, §§ 24, 29) must be upheld, as to its prospective and retrospective application. Hence, Con Ed's cross motion is denied.

## RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The parties have agreed that in the event that the court should uphold the constitutionality of the 1982 amendment, that such a result would be dispositive of the respondent's motion. Accordingly, the respondent's motion for partial summary judgment is now granted.

## ORDER OF SUPREME COURT, ALBANY COUNTY

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York on the 28th day of February, 1983.

PRESENT: HONORABLE THOMAS J. LOWERY, JR.
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

against

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

*Respondent and Intervenors-Respondents.*

Respondent, the State Board of Equalization and Assessment and Respondents-Intervenors City of New York, Village of Scarsdale, City of Mount Vernon, Towns of Greenberg, New Castle, Harrison, Ossining and Yorktown, Villages of Ardsley, Briarcliffe Manor, Bronxville, Mount Kisco, Ossining, Pleasantville and the City of Peekskill having moved for an order granding partial summary judgment dismissing those portions of those petitions which seek to establish erroneous assessments by reason of inequality in that the respondent, State Board of Equalization and Assessment, arrived at and applied incorrect equalization rates in establishing special franchise assessments for the tax years 1974-1975 through 1977-1978 and which seek to establish what the equalization rates should be by substituting equalization rates derived from current sales in each of the taxing units in the place and stead of the equalization rates found by the State Board of Equalization and Assessment on the grounds that inequality in proceedings commenced pursuant to Real Property Tax Law § 740, may not be proved by resort to evidence reserved

for traditional inquality proceedings brought pursuant to Real Property Tax Law §706 and that petitioner may neither disprove the actual equalization rate utilized by the State Board of Equalization and Assessment nor prove what the equalization rate should be; and petitioner Consolidated Edison Company of New York, Inc., having cross moved for an order declaring that the provisions of Real Property Tax Law §744(1) as amended by L.1982 chs. 24 and 29 are unconstitutional and void; and said motions having regularly come on to be heard on the 28th day of February, 1982;

NOW, upon reading and filing the Notice of Motion for Partial Summary Judgment of the respondent and intervenor respondents dated September 10, 1982, the affidavit of Carl Rosenbloom sworn to on the 10th day of September, 1982; the Notice of Cross Motion of petitioner dated November 24, 1982, and the affidavit of Mark S. Tulis, dated on the 22nd day of November, 1982; the reply affidavit of Mark S. Tulis, dated the 24th day of March, 1983; the affidavit in response to reply affidavit oy John P. MacArthur dated April 7, 1983; the reply affidavit of Michael Whiteman dated April 13, 1983; and after hearing Michael Whiteman, Esq. on behalf of fourteen Westchester municipalities; John P. MacArthur, Special Counsel to the Corporation Counsel of the City of New York; Marvin S. Fink, Esq. on behalf of the Village of Scarsdale, Carl Rosenbloom, Assistant Attorney General, of Counsel, on behalf of the respondent State Board of Equalization and Assessment, Henry J. Smith, Esq. on behalf of the intervenor respondent City of Mount Vernon, all in suppoort of respondent and intervenors-respondents motion for parital summary judgment; and Mark S. Tulis, Esq., and Martin Cowan, Esq., Special Counsel to the petitioner in opposition to the motion for partial summary judgment and in support of petitioner's cross motion, and due deliberation having been had thereon; and the court having rendered its decision dated August 15, 1983, it is

ORDERED, that the motion by respondent State Board of Equalization and Assessment and intervenor-respondents be and the same is, in all respects, GRANTED, and that the respondent

and intervenor-respondents have partial summary judgment against the petitioner dismissing the portions of those petitions seeking to establish that the petitioner's assessments were unequal in that the equalization rates used by the State Board of Equalization and Assessment in determining the assessment did not represent that ratio between assessed valuation and full valuation in the taxing units where the petitioner's property was situated, and it is

FURTHER ORDERED that petitioner's cross motion seeking to declare Real Property Tax Law §744(1), as amended by L.1982 chs. 24 and 29 unconstitutional and void is in all respects denied.

Dated: September 20, 1983
Syracuse, New York

ENTER:

/s/ Thomas J. Lowery, Jr.

Honorable Thomas J. Lowery, Jr.
Acting Supreme Court Justice

Signed: September 24, 1983
Syracuse, New York

NOTICE OF APPEAL

# Court of Appeals

*of the*

# State of New York

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Respondent,*

– and –

CITY OF NEW YORK, CITY OF MOUNT VERNON, CITY OF PEEKSKILL, CITY OF RYE, CITY OF WHITE PLAINS, CITY OF NEW ROCHELLE, TOWN OF GREENBURGH, TOWN OF NEW CASTLE, TOWN OF HARRISON, TOWN OF OSSINING, TOWN OF YORKTOWN, TOWN OF BEDFORD, TOWN OF EASTCHESTER, TOWN OF MAMARONECK, TOWN OF MOUNT KISCO, TOWN OF MOUNT PLEASANT, TOWN OF RYE, TOWN OF SCARSDALE, VILLAGE OF SCARSDALE, VILLAGE OF ARDSLEY, VILLAGE OF BRIARCLIFF MANOR, VILLAGE OF BRONXVILLE, VILLAGE OF MOUNT KISCO, VILLAGE OF OSSINING, VILLAGE OF ELMSFORD, VILLAGE OF LARCHMONT, VILLAGE OF MAMARONECK, VILLAGE OF PELHAM, VILLAGE OF PORT CHESTER, AND VILLAGE OF PLEASANTVILLE,

*Intervenors-Respondents.*

## NOTICE OF APPEAL

PLEASE TAKE NOTICE that Consolidated Edison Company of New York, Inc. hereby appeals to the Supreme Court of the United States from the order of the New York Court of Appeals dated and entered March 18, 1986. This appeal is being taken pursuant to 28 U.S.C. sec. 1257(2).

Dated: New York, New York
May 20, 1986

MILBANK, TWEED, HADLEY
& MCCLOY
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000

ERNEST J. WILLIAMS
4 Irving Place
New York, New York 10003
(212) 460-2541

ROSENBERG & TULIS
230 Park Avenue
New York, New York 10169
(212) 697-2371

*Attorneys for Appellant*

TO: HON. ROBERT ABRAMS
*Attorney General of the State of New York*
*Attorney for Appellee State Board of Equalization and Assessment*
Empire State Plaza
Albany, New York 12224

HON. FREDERICK A.O. SCHWARZ, JR.
*Corporation Counsel of the City of New York*
c/o JOHN P. MACARTHUR
*Special Counsel for Appellee City of New York*
284 State Street
Albany, New York 12210

WHITEMAN, OSTERMAN & HANNA
*Attorneys for Appellees City of Peekskill, Towns of Greenburgh, Harrison, New Castle, Ossining, and Yorktown and Villages of Ardsley, Briarcliff Manor, Bronxville, Mount Kisco, Ossining, Pelham, and Pleasantville*
One Commerce Plaza
Albany, New York 12260

MCCARTHY, FINGAR, DONOVAN, DRAZEN & SMITH
*Attorneys for Appellees City of Mount Vernon and Towns of Eastchester, Mamaroneck, Mount Pleasant, and Scarsdale*
175 Main Street
White Plains, New York 10601

MARVIN S. FINK
*Attorney for Appellee Village of Scarsdale*
220 Harwood Building
Scarsdale, New York 10583

JAMES F. DONOHUE
*Attorney for Appellee Town of Bedford*
199 Main Street
White Plains, New York

THOMAS F. ENGLISH, JR.
*Attorney for Appellee Village of Elmsford*
50 Main Street
Elmsford, New York

GEORGE P. FORBES, JR.
*Attorney for Appellee Village of Larchmont*
9 Woodland Avenue
Larchmont, New York

MAXWELL E. CHARAT
*Corporation Counsel*
*Attorney for Appellee City of New Rochelle*
515 North Avenue
New Rochelle, New York

EDWARD SALTZMAN
*Corporation Counsel*
*Attorney for Appellee Village of Port Chester*
315 Westchester Avenue
Port Chester, New York 10573

MILTON BERNER
*Attorney for Appellees Town of Rye*
*and Village of Mamaroneck*
812 The Parkway
Mamaroneck, New York 10543

RICHARD GARDELLA
*Corporation Counsel*
*Attorney for Appellee City of Rye*
City Hall
Rye, New York 10580

Filed with the Clerk of the New York Court of Appeals on June 7, 1986, and with the Clerk of Albany County on June 11, 1986.

## NOTICE OF MOTION FOR ORDER GRANTING PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT and THE CITY OF NEW YORK, et al.,

*Respondent and Intervenors-Respondents.*

## NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

(168 Proceedings)
Index Nos. 11747/74, 6848/77, 1555/75, 1214/76, etc.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Carl Rosenbloom, sworn to September 10, 1982, and upon all the pleadings and proceedings heretofore had herein, Respondent State Board of Equalization and Assessment and Respondents-Intervenors City of New York, Village of Scarsdale, City of Mount Vernon, Towns of Greenburgh, New Castle, Harrison, Ossining, and Yorktown, Villages of Ardsley, Briarcliff Manor, Bronxville, Mount Kisco, Ossining, Pleasantville and the City of Peekskill will move this Court at a Special Term to be held at the State Office Building, Syracuse, New York on December 7, 1982 at 11:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting partial summary judgment dismissing those portions of the petitions herein which seek to substitute equalization rates derived

from current sales of real property in each of the taxing units herein in place of an equalization rate found by Respondent State Board of Equalization and Assessment or to prove that the equalization rate applied by the respondent was improperly determined and for such other and further relief as to the Court may appear just and proper in the premises.

DATED: Albany, New York
September 10, 1982

Yours, etc.,

ROBERT ABRAMS
Attorney General
(Carl Rosenbloom, Esq.)
Attorney for Respondent
Office and P.O. Address
The Capitol
Albany, New York 12224

WHITEMAN, OSTERMAN &
HANNA, ESQS.
99 Washington Avenue
Albany, New York 12210

HENRY J. SMITH, ESQ.
McCarthy, Fingar, Donovan
& Glatthaar, Esqs.
175 Main Street
White Plains, New York

MARVIN S. FINK, ESQ.
Harwood Building, Room 220
Scarsdale, New York 10583

JOHN P. MacARTHUR, ESQ.
284 State Street
Albany, New York 12210

TO: WEIN, LANE & MALKIN, ESQS.
60 East 42nd Street
New York, New York 10017

## AFFIDAVIT OF CARL ROSENBLOOM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT and THE CITY OF NEW YORK, et al.,

*Respondent and Intervenors-Respondents.*

## AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

(168 Proceedings)
Index Nos. 11747/74, 6848/77, 1555/75, 1214/76, etc.

STATE OF NEW YORK )
) SS:
COUNTY OF ALBANY )

CARL ROSENBLOOM, being duly sworn, deposes and says that:

1. I am an attorney admitted to practice before the Courts of the State of New York, of counsel to respondent State Board of Equalization and Assessment herein, and am familiar with the facts and circumstances of this proceeding.

2. This proceeding has, from the outset, involved two main claims by petitioner: that any equalization rate and the value utilized by respondent in calculating petitioner's assessments were both incorrect.

3. With respect to rate, the Court is familiar with the decision of the Court of Appeals which affirmed the dismissal of respondents' motion for partial summary judgment with respect to the rate portion of this proceeding, and with various subsequent activities based on that decision. Since then, however, the Legislature has enacted L.1982, c. 714, two portions of which are relevant to this proceeding:

> "§24. Subdivision one of section seven hundred forty-four of such law is amended to read as follows:
>
> 1. In a proceeding to review a special franchise assessment, upon filing of the answer or upon joinder of issue the court may take such evidence as it may deem necessary or may appoint a referee to take evidence and hear and determine all questions raised by the petition and the answer thereto. *Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue.* Upon motion of either party the court may order the place of trial changed to the county in which the special franchise under review is situated. The place of trial shall be deemed changed to the county designated and the papers and proceedings shall be certified to that county in the manner provided by law in the case of a change in the place of trial of an action and all subsequent proceedings shall be had in the county so designated as if the special proceedings had been originally instituted in that county."
>
> "§29. This act shall take effect January first, nineteen hundred eighty-three, provided however, that the provisions of section twenty-four of this act shall take effect immediately and shall be applicable to any proceeding commenced on or after January first, nineteen

> hundred seventy-three and not finally determined as of the effective date hereof and to all proceedings hereafter commenced."

4. These sections are dispositive of the question of rate herein. Petitioner, however, is of a different view.

5. Reference is respectfully made to an affirmation by petitioner's attorney, Mr. Cowan, dated July 7, 1978, and a memorandum of the same date, previously submitted to this Court in connection with petitioner's motion for discovery. Paragraph 15 of the said affirmation commences with the following two sentences:

> "It is ConEdison's intention to establish the extent to which the assessments in these cases are unequal by relying on evidence of sales transactions pursuant to §720, RPTL. To the extent possible, it will introduce evidence of all arms-length sales prices during the taxable years in question in the municipalities involved."

Paragraphs 16 and 17 of the aforesaid affirmation are to substantially the same effect.

6. In the memorandum submitted by petitioner in support of its discovery motion, petitioner's intention is made even more plain. Reference is respectfully made to page 12 of the said memorandum, on which is found the following statement:

> "Con Edison claims, *inter alia*, that the State Board calculated the rates incorrectly to begin with, primarily by using the wrong data . . . to prove what the rates should be, Con Edison intends to use the data actually available to the State Board and to demonstrate, based on such data what each rate should be."

Reference is also respectfully made to page 18 of the said memorandum, upon which appears the following language:

> "Con Edison intends to use essentially the same method herein as was approved in *Standard Brands* . . . It

> will offer evidence of us many sales as possible, without selection other than to exclude those transactions which do not appear to be arms-length."

7. It therefore appears that petitioner herein asserts a right to attempt to do the following things upon the trial of this matter:

> A. Attack the equalization rate utilized in each year and for each jurisdiction by the State Board of Equalization and Assessment;
>
> B. Replace this rate by a rate derived from an analysis of all of the sales in each of the jurisdictions for each of the relevant years;
>
> C. Procure from respondent and the various intervenors-respondents whatever petitioner may require to accomplish these tasks.

8. It is respectfully urged that petitioner has no right to do any of these things. All of them depend upon the view expressed by petitioner that it is authorized to proceed in this fashion by §720 of the Real Property Tax Law. Movants herein respectfully urge that the said §720, or in any event the portion thereof invoked by petitioner, does not apply to this proceeding or to any special franchise proceeding; that the assessment of special franchises is governed by Article VI of the said law; that respondent is, by §600 thereof, assigned the function of determining special franchise assessments; that the manner in which it is to do this is set forth in §606 (following receipt from the franchisees themselves of the material set forth in §604); that, by the new law, respondent's determination is conclusive.

9. No judgment as to the questions of rate or valuation in the proceedings herein is outstanding.

WHEREFORE, deponent requests that the motion be granted in its entirety.

/s/ Carl Rosenbloom
CARL ROSENBLOOM

Sworn to before me this
10th day of September, 1982.

/s/
Notary Public

## NOTICE OF CROSS- MOTION TO DECLARE REAL PROPERTY TAX LAW §744(1) UNCONSTITUTIONAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,

*Respondent and Intervenors-Respondents.*

NOTICE OF CROSS-MOTION

(168 Proceedings)
Index Nos. 11747/74 et al.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Mark S. Tulis, sworn to November 22, 1982, and the prior pleadings and proceedings herein, the undersigned will move this Court, upon the argument of the motion for partial summary judgment made by respondent The State Board of Equalization and Assessment and intervenors-respondents The City of New York, *et al.* returnable on January 11, 1982 at 11:00 o'clock a.m. at a Special Term to be held at the State Office Building, Syracuse, New York, for a determination and order declaraing that the provisions of Real Property Tax Law §744(1), as amended by L. 1982 chs. 24 and 29, violate and provisions of the Constitution of the State of New York and the Constitution of the United States and are unconstitutional and void; together with such other and further relief as to this Court seems proper.

DATED: New York, New York
November 24, 1982

Yours, etc.,

WIEN, LANE & MALKIN
Special Counsel to Petitioner
Lincoln Building
60 East 42nd Street
New York, NY 10165
(212) 687-8700

TO: Robert Abrams, Esq.
Attorney General of the
State of New York
(Carl Rosenbloom, Esq.)
Attorney for Respondent
State Capitol
Albany, New York 12224

Whiteman, Osterman & Hanna, Esqs.
Attorneys for Respondents-Intervenors
99 Washington Avenue
Albany, NY 12210

McCarthy, Fingar, Donovan
& Glatthaar, Esqs.
(Henry J. Smith, Esq.)
Attorneys for Intervenors-Respondents
175 Main Street
White Plains, NY 10601

John P. MacArthur, Esq.
Attorney for Intervenor-Respondent
284 State Street
Albany, NY 12210

Marvin S. Fink, Esq.
Attorney for Intervenor-Respondent
220 Harwood Building
Scarsdale, NY 10583

**AFFIDAVIT OF MARK S. TULIS IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF ALBANY**

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT *et al.*,

*Respondents and Intervenors-Respondents.*

**AFFIDAVIT**

(168 Proceedings)
Index Nos. 11747/74 et al.

STATE OF NEW YORK )
) SS:
COUNTY OF ALBANY )

MARK S. TULIS, being duly sworn, deposes and says:

1. I am associated with the firm of Wien, Lane & Malkin, Special Counsel for Petitioner Consolidated Edison Company of New York, Inc. ("Con Edison").

2. I am fully familiar with the matters herein referred to and make this affidavit in support of Con Edison's cross-motion for a determination and order declaring that the provisions of Real Property Tax Law ("RPTL") §744(1), as amended by L. 1982 chs. 24 and 29, violate the provisions of the Constitution of the State of New York and the Constitution of the United States and are unconstitutional and void, and in opposition to the motion for

partial summary judgment of the respondent The State Board of Equalization and Assessment ("State Board") and certain intervenors-respondents.

3. Commencing in 1974, Con Edison initiated the within proceedings pursuant to RPTL Article 7 to review the real property tax assessments on its special franchise properties for the assessment rolls completed that year. Additional proceedings were commenced for each subsequent year for 44 separate tax districts in New York City, Westchester and Rockland Counties.

4. The proceedings were commenced after Con Edison was unsuccessful in obtaining reductions in the tentative assessed values of Con Edison's special franchise property.

5. At the administrative hearings held with respect to the tentative assessed values, Con Edison was not permitted to introduce any evidence as to the equalization rates used by the State Board. In fact, the notices of tentative special franchise assessments served by the State Board on Con Edison (and forwarded to our office) merely apprise Con Edison of the net assessment – the equalization rate presumably applied by the State Board to the full value of the property, pursuant to RPTL §606, is not set forth.

6. The 168 matters for which the motion and cross-motion are made related to the first four years for each municipality, which were consolidated and ordered tried together by an order of the Supreme Court, Albany County (Koreman, J.) entered in the office of the Clerk on September 20, 1979.

7. In its petitions, Con Edison has alleged that its properties have been overassessed on the basis of overvaluation and inequality. A copy of the notice of petition and petition for the Village of Pleasantville for 1976 is annexed as Exhibit A as an exemplar. The motion and cross-motion relate solely to the allegations of inequality.

8. With respect to the inequality claim, Con Edison has asserted throughout these proceedings, *inter alia*, that:

(a) its subject property has been assessed at a higher proportionate valuation than the assessments of other real property;

(b) if applied, the equalization rate which the RPTL requires the State Board to apply to the full value of the subject property has been determined by the State Board in a manner which violates said RPTL and, hence, which is excessive; and

(c) the final assessments have been determined in violation of the provisions of the Constitutions of the State of New York (Article 1, §§6 and 11 and Article 16 §2) and the United States. (Fifth and Fourteenth Amendments).

9. Under RPTL §1202, the equalization rate is required to be determined by the State Board "as near as may be" to the level of assessment in each municipality, that is, the average rate of assessed value to fair market value.

10. Through use of the New York State Freedom of Information Law (Pub. Off. L. §85, *et seq.*), I obtained copies of certain documents of the State Board. Included in the documents I reviewed were memoranda dated February 19, 1974, December 4, 1974, August 22, 1977, July 18, 1978 and July 14, 1979, as well as a letter dated February 7, 1977 from Mr. Beebe, counsel to the State Board, to Alan J. Underberg, a member of the Board. These materials and others generally available to the public indicate that in many cases the state rates are "blended" in order to achieve a pre-determined result, how in other cases valid evidence of the true levels of assessment is supressed to achieve the desired result, and how in all cases the rates are adversely affected by a time lag. Copies of the aforementioned documents are annexed as Exhibits B through G, respectively.

11. Annexed as Exhibit H is a letter from Joseph P. McCale, counsel to the Temporary State Commission on the Real Property Tax, dated May 11, 1979, to Governer Carey with respect to L. 1979 ch. 126, indicating the nature of the time lag in computing

equalization rates. The original of this letter is contained in the bill jacket for L. 1979 ch. 126.

12. Although the State Constitution prohibits assessments in excess of full value, we have been advised by the State Board that the equalization rate exceed 100% in the following proceedings involved in this motion: Town of Bedford, 1974 (124%), 1975 (116.6%) and 1976 (105.1%); Village of Pleasantville, 1974 (118%), 1975 (105%), 1976 (103.32%), and 1977 (101.47%); and Village of Briarcliff Manor, 1975 (109%), 1976 (104.10%); and 1977 (101.91%). Additionally, in some of the other pending proceedings for 1978, 1979, 1980 and 1981 the rates exceeded 100%, reaching as much as 166% for New Castle in 1980.

13. Annexed as Exhibit I is a portion of the September 15, 1978 transcript of the hearing before Judge Koreman on the inequality issue. Attention is respectfully called to the comments of Robert Beebe, counsel to the State Board, in which it is indicated that special franchise property is to be assessed at the same ratio as other real property within each of the jurisdictions and those of Mr. MacArthur, counsel to the City of New York, in which it is stated that the inequality question is "half" of these proceedings.

14. The above referenced facts demonstrates that the equalization rates do not properly reflect "as near as may be" the proportion of full value at which taxable real property is assessed within each jurisdiction, as is asserted by Con Edison.

15. In a decision dated February 2, 1980, the Appellate Division, Third Department held that Con Edison and other special franchise property owners have the right to demonstrate inequality of assessment and the inaccuracy of the equalization rates determined by the State Board. (73 A.D.2d 31, 425 N.Y.S.2d 651). The Court of Appeals affirmed the Appellate Division decision on June 2, 1981. (53 N.Y.2d 975, 441 N.Y.S. 2d 669, 424 N.E.2d 556).

16. In an order dated February 26, 1982, Special Term granted Con Edison discovery of the State Board on the inequality question with respect to the following matters:

1) Sales of real property in the taxing unit took place during the tax years under review;

2) Verification of such sales;

3) The uses to which the verified sales were put;

4) The equalization rate computed for taxing units outside of New York City for the roles containing the assessment under review, the data base used, and the methodology employed to compute such rate;

5) The disclosure of the equalization rate that was used to assess the petitioner's properties for the years under review. Such disclosure shall pertain to the rate itself and not the data base or the methodology employed to compute such rate.

17. On April 1, 1982, the State Board noticed its appeal of the February 26, 1982 order to the Appellate Division, Third Department. On April 8, 1982 Con Edison cross-appealed that portion of Special Term's order which denied it certain additional discovery as to the methodology and data base used in computing the equalization rates utilized in determining the assessments of Con Edison's special franchise property.

18. In light of the recent amendments to RPTL §744(1) enacted as part of L. 1982 ch. 714, which goes to the legal basis for Con Edison's inequality claim, I requested that the appeal on the discovery issue be removed from the calendar of the Appellate Division pending a decision by this Court on the within motions. In a letter dated September 22, 1982, the Clerk of the Appellate Division granted my request.

19. In an order dated June 8, 1982, Con Edison's inequality claims were set down for trial commencing November 29, 1982. A copy of the Court's order is annexed as Exhibit J.

20. In apparent response to the decisions of the Appellate Division and Court of Appeals permitting Con Edison (and other

owners of special franchise utility property) to assert inequality of assessment, and the order setting down the inequality aspects of these proceedings for trial, the Legislature passed on July 2, 1982 and the Governer signed into law on July 22, 1982 new legislation (L. 1982 ch. 714) aimed at restricting the rights of special franchise property owners to demonstrate inequality of assessment.

21. Annexed as Exhibit K is a copy of an article appearing at page 24 of the July 3, 1982 New York Times, which contains comments concerning L. 1982 ch. 714.

22. On September 15, 1982, I reviewed the bill jacket for L. 1982 ch. 714 at the office of Governor's counsel.

23. Annexed as exhibits to this affidavit are true copies of the following documents from the bill jacket which address themselves to the merits of chapter 714.

A) Exhibit L - Budget Report on Bills dated July 14, 1982.

B) Exhibit M - Letter of Edwin L. Crawford, Executive Director of the New York State Associaion of Counties, dated July 19, 1982, to John G. McGoldrick.

C) Exhibit N - Letter of Edwin L. Crawford, Executive Director of the New York State Association of Counties, dated July 19, 1982, to John G. McGoldrick.

D) Exhibit O - Letter of Robert L. Beebe, Counsel to the State Board of Equalization and Assessment, dated July 16, 1982, to John G. McGoldrick, together with annexed Memorandum to Mr. Beebe from Michael E. Kupferman and Memorandum in Support.

E) Exhibit P - Letter of John P. MacArthur, Special Counsel to the City of New York, dated July 19, 1982, to John G. McGoldrick (without enclosures).

F) Exhibit Q - Letter of Michael Whiteman, Counsel to the "Westchester Municipalities"; dated July 16, 1982, to John G. McGoldrick.

G) Exhibit R - Memorandum from Paul L. Gioia, Chairman, New York Department of Public Service, dated July 20, 1982 to John G. McGoldrick.

24. As indicated by the comments of State Senator Voelker and the documents contained in the bill jacket and annexed hereto as exhibits, the purpose of L. 1982 ch. 714 §§24 and 29 is to reverse the holding of the Court of Appeals permitting Con Edison to assert inequality, so as to insulate the intervenors herein from refund claims asserted by Con Edison for excessive tax payments made as much as eight years ago.

25. Chapter 714 purports to make the equalization rate (or special equalization rate) retroactively binding and conclusive upon the parties in an action brought by special franchise property owners to reduce the assessments on their property.

26. Chapter 714 apparently bars special franchise property owners of the right to utilize the "all sales" or select parcel method to show inequality although such methods remain available to all other property owners in the state.

27. There is left to special franchise property owners *no* method to show inequality of assessment for the years involved in these proceedings, nor to show that the State Board erred – deliberately or otherwise – in the calculation of the equalization rates it applied in these proceedings. Thus, special franchise property owners are completely barred from any judicial or administrative review of the determination of a principal component used in assessing their property.

28. On the basis of the provisions of RPTL §744(1), as amended by L.1982 ch. 714, the State Board and the Intervenors have renewed their motions for partial summary judgment dismissing the inequality portions of the Con Edison petitions.

29. Section 24 of chapter 714 of the Laws of 1982, as applied to the within proceedings, is unconstitutional in violation and the New York and United States Constitutions, in that the statute:

(a) retroactively bars Con Edison from asserting a substantive right to a reduction of its assessments for the years 1974 through 1981, thereby depriving special franchise owners of their property without due process of law, while permitting all other property owners the opportunity to demonstrate inequality of assessment for past years, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 6 and Article 1, Sections 6 and 11 of the New York State Constutition;

(b) denies special franchise owners the right to challenge the tax assessments on their property, thereby depriving special franchise owners of their property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 6 and Article 16, Section 2 of the New York State Constitution;

(c) improperly bars special franchise property owners from demonstrating inequality of assessment, while permitting all other property owners the opportunity to demonstrate inequality of assessment, thereby depriving special franchise property owners of their right to equal protection of the laws of the State, in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the New York State Constitution;

(d) improperly delegates to the State Board the function of equalizing special franchise assessment without reasonable safeguards and standards, in violation of the Fifth and Fourteenth Amendments

to the United States Constitution and Article 1, Section 6, Article 16, Section 2 and Article 3, Section 1 of the New York State Constitution.

(e) improperly restricts the trial court from admitting into evidence relevant facts demonstrating inequality or that the State Board is assessing at greater than full value and improperly creates a conclusive presumption as to the correctness of the equalization rates, thereby depriving special franchise owners of due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitutions and Article 1, Section 6 and Article 16, Section 2 of the New York State Constitution.

30. As the amendment is unconstitutional and void and cannot therefore be applied to Con Edison herein, the law remains the same as decided by the Court of Appeals in 1981, and therefore, this Court should be bound by the Court of Appeals decision permitting Con Edison 1) to demonstrate the inaccuracy of the equalization rates utilized by the State Board in assessing Con Edison's special franchise property; and 2) to demonstrate that Con Edison's special franchise property has been assessed at a higher proportionate valuation than other real property within each taxing jurisdiction for each year before the Court herein.

WHEREFORE, it is respectfully urged that: 1) the cross-motion for a determination and order declaring that the provisions of RPTL §744(1), as amended by L. 1982 chs. 24 and 29 violate the provisions of the Constitutions of the State of New York and the Constitution of the United States and are unconstitutional and void be, in all respects, granted; 2) the renewed motion for partial summary judgement be denied; and 3) the Court grant such further relief as may seem just or appropriate in the circumstances.

/s/ Mark S. Tulis

Mark S. Tulis

Sworn to before me this
22nd day of November 1982.

/s/ Edward F. Gee

Notary Public

EDWARD F. GEE
NOTARY PUBLIC, STATE OF NEW YORK
NO. 24-4513799
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES MARCH 30, 1983

EXHIBIT A TO AFFIDAVIT OF MARK S. TULIS

PETITION FOR REVIEW OF 1976 ASSESSMENT OF VILLAGE OF PLEASANTVILLE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter

of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Respondent.*

Index No.

1976 SPECIAL FRANCHISE ASSESSMENT

VILLAGE OF PLEASANTVILLE

PETITION FOR REVIEW OF TAX ASSESSMENT

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of Consolidated Edison Company of New York, Inc. respectfully alleges and shows to this Court, as follows:

1. Petitioner is, and at all times relevant hereto was, a public utility corporation duly organizaed and existing under and by virtue of the laws of the State of New York, having its principal offices at 4 Irving Place, Borough of Manhattan, City, County and State of New York.

2. Petitioner is, and at all times relevant hereto was, engaged in the manufacture of electric energy and in the distribution and sale of electric energy and natural gas to consumers in portions of the City of New York and Westchester County, and in the manufacture, distribution and sale of steam to consumers in portions of the Borough of Manhattan, County of New York, pursuant to certain franchise rights duly granted and held by it according to law and subject to the supervision and regulation of the New York Public Service Commission.

3. Petitioner, in connection with its business, has been granted certain rights to erect, construct and maintain its pipes, wires, poles, conduits, transformers and other utility property in, under, above, upon or through public streets and public places, which rights and property have been designated in §102(17) of the Real Property Tax Law ("RPTL") as "special franchise" property.

4. The Respondent, State Board of Equalization and Assessment ("State Board"), is required by the RPTL to fix and determine annually the full and equalized valuation of special franchises for purpose of real property taxation.

5. On or about February 6, 1976, the State Board, by written notice of tentative special franchise assessment, notified petitioner that it had fixed and determined the 1976 tentative assessment of petitioner's special franchise property located in the Village of Pleasantville at the sum of $3,717,528. Said notice did not indicate the equalization rate, if any, applied by the State Board, or the value to which it was applied. The notice advised that a hearing had been scheduled before the State Board to hear complaints with respect to such assessment on March 19, 1976.

6. On or about March 5, 1976, petitioner, claiming to be aggrieved by the said tentative assessment, duly served upon the State Board and all other parties required by law, a written complaint for the correction of such assessment. In the complaint and subsequently at the hearing before the Board on March 19, 1976, petitioner specified its objections to the tentative assessment on the grounds that said assessment was erroneous by reason

of illegality, inequality and overvaluation and specifically set forth the extent of the claimed overvaluation. A copy of the complaint and the written statement submitted by Con Edison to the State Board at the hearing are annexed hereto as Exhibits "A" and "B", respectively. Said documents and the contents thereof are incorporated by reference with the same force and effect as if set forth more fully and at length herein.

7. Notwithstanding Con Edison's written complaint and its objections at the hearing, no reduction of the tentative assessment was made, and, on or about April 9, 1976, petitioner received a copy of the Certificate of Final Special Franchise Assessment from the State Board indicating that the final 1976 special franchise assessment of its property had been determined in the sum of $3,717,528.

8. The State Board's final 1976 assessment is erroneous by reason of overvaluation. Con Edison asserts that the full value of its special franchise property is $2,393,678, the equalization rate to be applied to such full value is 103.32%, and that therefore the equalized valuation for such property is $2,473,148.

Accordingly, the amount of the claimed overvaluation is $1,244,380.

9. The final assessment is erroneous by reason of inequality, *inter alia*, in that:

(a) the subject property has been assessed at a higher proportionate valuation than the assessments of other real property located in the Village of Pleasantville;

(b) the equalization rate mandated by the RPTL to be applied to the full value of the subject property has been improperly derived and applied by the State Board; and

(c) the State Board has applied different standards and criteria in valuing the subject property than it has

in valuing the special franchise properties of other utilities located in the State of New York, producing a relatively higher value for Con Edison's property.

10. The final assessment is erroneous by reason of illegality, *inter alia*, in that the State Board has acted erroneously, unlawfully, arbitrarily and capriciously:

(a) in failing to employ a proper standard in determining the full value of the subject property for assessment purposes;

(b) in applying different standards and criteria in valuing the subject property than it has in valuing the special franchise properties of other utilities located in the State of New York, producing a relatively higher value for Con Edison's property;

(c) in failing properly to equalize the full value of the subject property as required by law;

(d) in improperly including in its final assessment an amount purportedly representing an intangible value for the subject property;

(e) in failing to determine the final assessment of the subject property and to file a Certificate of Final Special Franchise Assessment with respect thereto with the appropriate officials of the Village of Pleasantville within the time period prescribed by the RPTL and, in particular, Section 616 thereof; and

(f) in failing to prohibit or take such action as would be appropriate to prohibit the Village of Pleasantville from placing the final 1976 assessment or any other purported assessment for 1976 of the subject property on its current 1976/1977 assessment roll after such rolls have become final or by law were required to have become final.

11. The inclusion by the Village of Pleasantville of the final 1976 assessment or any other purported assessment for 1976 of Con Edison's special franchise property on its current 1976/1977 rolls, after such rolls have become final or by law were required to have become final, is illegal, unjust and a deprivation of petitioner's property without due process of law.

12. Petitioner is and will be aggrieved and injured by the foregoing erroneous, overvalued, unequal and illegal assessment.

13. Not more than 60 days have elapsed since the service upon petitioner of written notice of the filing of the Certificate of Final Special Franchise Assessment by the respondent.

14. No prior application to any Court or Judge has been made for the review or correction of the said assessment.

WHEREFORE, petitioner respectfully requests that the said 1976 assessment for the purpose of real property taxation of its special franchise located in the Village of Pleasantville for hte 1976/1977 tax year be declared and determined to be erroneous by reason of overvaluation, inequality and illegality as set forth herein; that the value of the special franchise be determined to be $2,473,148; that the assessment be declared and determined to be illegal and that any entry of such assessment on the assessment rolls of the Village of Pleasantville for the 1976/1977 tax year be ordered removed and the Village of Pleasantville be enjoined from collecting any taxes based on such illegal assessment and ordered to refund the taxes paid by petitioner based on such illegal assessment; that the proceedings, decisions and actions of respondent be reviewed on the merits by this Court and that the aforesaid errors of respondent be corrected in accordance with law; that the Court take evidence or cause the same to be taken before a referee to show the overvaluation, inequality and illegality of said assessment; and that this Court grant petitioner such other and further relief as to it may seem just and proper.

Dated: June 1, 1976
New York, New York

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

FREDERICK J. HUNZIKER, JR., being duly sworn, deposes and says that he is an officer, to wit, Assistant Vice President of Consolidated Edison Company of New York, Inc., the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief and that as to those matters he believes them to be true.

/s/ Frederick J. Hunziker, Jr.
Frederick J. Hunziker, Jr.

Sworn to before me this
1st day of June 1976

/s/ Louise S. Tozzi

LOUISE S. TOZZI
Notary Public, State of New York
No. 24-4008500
Qualified in Kings County
Certificate filed in New York County
Commission expires March 30, 1977

## EXHIBIT B ANNEXED TO AFFIDAVIT OF MARK S. TULIS, MEMORANDUM OF STATE BOARD OF EQUALIZATION AND ASSESSMENT, DATED FEBRUARY 19, 1974

February 19, 1974

TO: State Board of Equalization and Assessment
FROM: Mr. Kilmer, Mr. Stein, Mr. Swett, Mr. McKever and Mr. McGrath
SUBJECT: Recommended tentative rates for rolls completed in 1973 of 45 cities and 901 towns

The recommended tentative state equalization rates for assessment rolls completed in 1973 of 45 cities and 901 towns appear on List No. I.

The recommended tentative rates have been prepared in accordance with the regular procedures of the Board and are based entirely on the 1970 market value which is the standard of full value adopted by the Board for state equalization rates for city and town assessment rolls completed in 1973.

The equalization rates for 1971 assessment rolls were based entirely on the 1968 market values; and for the 1972 rates the standard was the simple average of 1968 and 1970 market value. Updating the standard to the 1970 market value alone for the 1973 rates, therefore, represents moving the second of the two 12 month intervals between 1968 and 1970.

This means that the impact resulting from the change in full value this year will be in the same magnitude as that which occurred last year in all municipalities for which no changes have been made to the 1970 survey data.

Attached on Table A is a frequency distribution of all cities and towns according to percent change in market value indicated by the 1971 and 1972 rates, and that indicated by the 1972 and

1973 rates. You will notice that the increases shown by the 1972 and 1973 rates are similar but generally less than the increases shown by the 1971 and 1972 rates. This results from the procedure of using the simple average of two market value price levels. While this procedure produces the mid point between the two price levels in terms of dollars, the percentage increase between the earlier (1968) and the average market value is larger than that between the average and the later (1970) market value, since the same dollar increase is applied to a larger base.

A brief explanation appears on List No. I for those municipalities for which the indicated change in full value is unusual. Explanations pertaining to the implied market trend appear only where such trend differs significantly from staff's estimated market trend for the municipality. For this reason, explanations sometime appear for trends which are smaller than others for which no explanation appears.

It is recommended that the indicated rates shown on List No. I be established as the tentative state equalization rates for assessment rolls completed in 1973 of the 45 cities and 901 towns included therein.

## TABLE A

Frequency Distribution of Cities and Towns According to the Percent Increase in Full Value (Exclusive of New Property) Between 1971 and 1972, and Between 1972 and 1973

| Pct. Increase in Full Value | Between 1971 and 1972 | | | Bewteen 1972 and 1973 | | |
|---|---|---|---|---|---|---|
| | Number | Percent of Total | Accum. Percent | Number | Percent of Total | Accum. Percent |
| Less Than 0 | 17 | 1.71 | 1.71 | 13 | 1.31 | 1.31 |
| 0 to 5 | 192 | 19.34 | 21.05 | 169 | 17.02 | 18.33 |
| 5 to 10 | 276 | 27.79 | 48.84 | 334 | 33.64 | 51.97 |
| 10 to 15 | 241 | 24.27 | 73.11 | 258 | 25.98 | 77.95 |
| 15 to 20 | 120 | 12.08 | 85.19 | 124 | 12.49 | 90.44 |
| 20 to 25 | 64 | 6.45 | 91.64 | 54 | 5.44 | 95.88 |
| 25 to 30 | 42 | 4.23 | 95.87 | 26 | 2.62 | 98.50 |
| 30 to 35 | 15 | 1.51 | 97.38 | 9 | .91 | 99.41 |
| 35 to 40 | 10 | 1.01 | 98.39 | 5 | .50 | 99.91 |
| More Than 40 | 16 | 1.61 | 100.00 | 1 | .10 | 100.01 |
| Total | 993 | 100.00 | | 993 | 100.01 | |
| First Quartile | 5.75 | | | 6.06 | | |
| Median | 10.19 | | | 9.73 | | |
| Third Quartile | 15.71 | | | 14.35 | | |

## EXHIBIT C ANNEXED TO AFFIDAVIT OF MARK S. TULIS, MEMORANDUM OF STATE BOARD OF EQUALIZATION AND ASSESSMENT, DATED DECEMBER 4, 1974

December 4, 1974

TO: State Board of Equalization and Assessment
FROM: Mr. Kilmer, Mr. O'Shea, Mr. Stein, Mr. Swett, Mr. McKever and Mr. McGrath
SUBJECT: Full value standard for state equalization rates for assessment rolls of cities and towns completed in 1974

The City of New Rochelle, which must adopt its budget in December, has a tax limit problem. If a final rate has not been established for its 1974 roll the City will have to compute its constitutional tax limit with the 1973 and four preceding assessment rolls. The City used all of its taxing power for the current fiscal year. Rising costs make substantial cuts in services inevitable if the City is restricted to computing its taxing power on the same assessment rolls used for the current year.

The Board must decide on the full value standard for state equalization rates for 1974 rolls in order to establish a tentative rate for the City of New Rochelle.

In the past, the Board has always averaged a new survey the first time it was used. This practice was followed primarily to permit a smoother transition between successive surveys (which in the past have taken two years to complete) than would occur if a single survey was used alone.

In addition the level of statistical reliability was such that averaging could be expected to reduce the sampling error from the level existing in any single survey.

Major improvements in the sampling system and the use of a computer assisted appraisal system have resulted in substantial increases in the reliability of the 1970 and 1973 surveys. During the same period rapidly rising market prices have greatly increased the impact of the time lag between the full value standard used in state equalization rates and its use for computing local tax limits and apportioning school taxes.

The Board has been endeavoring to reduce this time lag in recent years. The 1973 survey will be completed in less than two years. We plan to complete the 1974 survey in one year. Thereafter we expect to maintain a one year schedule.

Table 1 shows that since 1971 although the time shifts between full value standards has been reduced, the time lag between the equalization rates and their use has not.

The use of the 1973 survey alone would substantially reduce this time lag but would result in much larger changes in market price levels than have ever occurred before. (See Table 2). A simple average of the 1970 and 1973 surveys would result in a smaller reduction in the time lag and a smaller increase in market price levels than the use of 1970 alone. Averaging with double weight to the 1973 survey would produce an even smoother transition to a one year survey than an average with equal weight. (See Table 1).

An average with double weight to 1973 results in a more orderly transition to a system of using a single survey alone each year than does the use of 1973. It also represents a more current level of market prices than an average with equal weight.

It is recommended that the Board adopt an average of 1970 and 1973 surveys which gives double weight to 1973 as the standard for state equalization rates for the assessment rolls of cities and towns completed in 1974.

Table 1

Time Lag Between Full Value Standards and Use of Equalization Rates for School Tax Apportionments: 1969-1973

| Year of Roll | Surveys Used | Weight | Market Price Level | Number of Months Shift in Price Level | Number of Years Lag For School Tax Apportionment |
|---|---|---|---|---|---|
| 1969 | 1963-1965 | 1-2 | 5/1/64 | — | 5-2/3 |
| 1970 | 1965-1968 | 1-1 | 7/1/66 | 26 | 5-1/2 |
| 1971 | 1968 | | 1/1/68 | 18 | 4 |
| 1972 | 1968-1970 | 1-1 | 1/1/69 | 12 | 4 |
| 1973 | 1970 | | 1/1/70 | 12 | 4 |
| *Alternatives for 1974:* | | | | | |
| A. 1973 alone and one year surveys thereafter | | | | | |
| 1974 | 1973 | | 1/1/73 | 36 | 2 |
| 1975 | 1974 | | 1/1/74 | 12 | 2 |
| 1976 | 1975 | | 1/1/75 | 12 | 2 |

B. 1970-1973 equal weight and one year surveys thereafter

| | | | | | |
|---|---|---|---|---|---|
| 1974 | 1970-1973 | 1-1 | 7/1/71 | 18 | 3-1/2 |
| 1975 | 1974 | | 1/1/74 | 30 | 2 |
| 1976 | 1975 | | 1/1/75 | 12 | 2 |

C. 1970-1973 double weight and one year surveys thereafter

| | | | | | |
|---|---|---|---|---|---|
| 1974 | 1970-1973 | 1-2 | 1/1/72 | 24 | 3 |
| 1975 | 1974 | | 1/1/74 | 24 | 2 |
| 1976 | 1975 | | 1/1/75 | 12 | 2 |

## Table 2

### Percent Change in Price Level Over Price Level Used for Preceding Year for State Equalization Rates: 1969-1973

| Year of Roll | Surveys Used | Weight | Market Price Level | Number of Months Shift in Price Level | Percent Change [1] |
|---|---|---|---|---|---|
| 1969 | 1963-1965 | 1-2 | 5/1/64 | — | |
| 1970 | 1965-1968 | 1-1 | 7/1/66 | 26 | 10.4 |
| 1971 | 1968 | | 1/1/68 | 18 | 6.8 |
| 1972 | 1968-1970 | 1-1 | 1/1/69 | 12 | 9.5 |
| 1973 | 1970 | | 1/1/70 | 12 | 8.6 |
| *Alternatives for 1974:* | | | | | |
| 1974 | 1973 | | 1/1/73 | 36 | 25.0 |
| 1974 | 1970-1973 | 1-2 | 1/1/72 | 24 | 16.7 |
| 1974 | 1970-1973 | 1-1 | 7/1/71 | 18 | 12.5 |

[1] Estimated for 1973 Survey.

EXHIBIT D ANNEXED TO AFFIDAVIT OF MARK S. TULIS, MEMORANDUM OF STATE BOARD OF EQUALIZATION AND ASSESSMENT, DATED AUGUST 7, 1977

August 22, 1977

TO: State Board of Equalization and Assessment
FROM: Mr. Jones and Mr. Crotty
SUBJECT: Full value standard for rates on 1977 assessment rolls

The attached material was prepared for the February, 1977 meeting at which the Board established the full value standard to be used in the computation of equalization rates and assessments for *1976* city and town assessment rolls. The Board adopted a full value standard based on equal weighting of the 1973 and 1974 survey data.

Table 1A in the attached material suggested the possibility that the equalization rates for *1977* rolls be based solely on 1974 survey data. Adoption of this suggestion has the obvious benefit of advancing the full value standard. However, it also presents the clear risk that in the succeeding year (*1978* rolls) it will be impossible to advance the full value standard because of the inability to complete the 1976 survey.

The 1976 survey has a valuation date of July 1, 1976, and work on it was started on about April 1, 1977. In order to use the 1976 survey in a timely fashion, (for rates for the 1977 rolls), preliminary results of the survey must be available by September, 1978. Under normal circumstances September 1, 1978 is not far off as a completion date for this survey. However, circumstances which have developed subsequent to the February Board meeting make this September, 1978 completion date extremely doubtful. Specifically, these circumstances are:

1. Complaints against the equalization rates for 1976 rolls exceeded three hundred.

2. The processing of this high complaint workload consumed a considerable number of staff man-days which would otherwise have been directed to appraisals for the 1976 survey.

3. The tight fiscal constraints imposed on all state agencies has left the Division's vacancy rate at a 20-25 percent level.

In establishing a full value standard for rates, accuracy is certainly a major consideration. However, we believe that the desirability for accuracy should not cause the equally critical considerations of timeliness and accuracy to be compromised. As you know, final equalization rates, special franchise assessments and railroad ceilings for 1976 city and town rolls are being established extremely late. Action in this time frame, with its attendant problems for local government, may arguably be described as producing more negative than positive results, currency of the standard notwithstanding.

Accordingly, the staff recommendation for the full value standard for rates and assessments established for 1977 assessment rolls is a new weighted combination of 1973 and 1974 survey data. Such combination will permit the Board to advance the standard a minimal amount. However, by not relying solely on the 1974 survey, the Board will retain the following capabilities:

1. Sufficient time to complete the 1976 survey.

2. Sufficient time to analyze the quality of the 1976 survey before making a commitment to when it will be first used in establishing rates.

3. Assurance that rates and assessments for 1978 rolls will be established in a timely fashion.

4. Assurance that the full value standard for 1978 rates and assessments will be susceptible to advancement.

The following is a graphic representation of three options for a weighted full value standard for rates and assessments for 1977 assessment rolls.

## WEIGHTING COMBINATIONS OF THE 1973 AND 1974 SURVEYS FOR USE IN ESTABLISHING RATES ON 1977 ASSESSMENT ROLLS

| | 1973 Survey | 1974 Survey | | | |
|---|---|---|---|---|---|
| WEIGHTINGS: | 1 - 1 | 1 - 2 | | | 0 - 1 |
| | 1976 | 1977 | | | 1978 |
| METHOD 1: | Equalization Rate | Equalization Rate | | | Equalization Rate |
| | | 3 Mos. | | 6 Mos. | |
| Market Value Date Line | 10/1/73 | 1/1/74 | | | 7/1/74 |
| | 1 - 1 | | 1 - 3 | | 0 - 1 |
| | 1976 | | 1977 | | 1978 |
| METHOD 2: | Equalization Rate | | Equalization Rate | | Equalization Rate |
| | | 4.5 Mos. | | 4.5 Mos. | |
| | 10/1/73 | | 2/15/74 | | 7/1/74 |

| | | | | |
|---|---|---|---|---|
| | 1 - 1 | | 1 - 4 | 0 - 1 |
| **METHOD 3:** | 1976 Equalization Rate | 5.5 Mos. | 1977 Equalization Rate | 1978 Equalization Rate |
| | 10/1/73 | | 3.5 Mos. 3/15/74 | 7/1/74 |

## EXHIBIT E ANNEXED TO AFFIDAVIT OF MARK S. TULIS, MEMORANDUM OF STATE BOARD OF EQUALIZATION AND ASSESSMENT, DATED JULY 18, 1978

July 18, 1978

TO: State Board of Equalization and Assessment
FROM: Mr. Gaskell and Mr. Jones
SUBJECT: Full value standard for establishing equalization rates on city and town assessment rolls completed in 1978

The determination of the full value standard to be used in the computation of equalization rates has been the subject of considerable discussion by the Board members in recent years. The corollary issue of the valuation date for each survey undertaken pursuant to section 1200 of the Real Property Tax Law, has received equal attention from the Board. The most recent valuation date discussion occurred at the June 1978 Board meeting at which time staff was directed to conduct the next survey using a July 1, 1978 valuation date. Based on the opinions expressed over the past several years by the Board members regarding the full value standard upon which the rates should be based, coupled with the decision reached by the Board at the June meeting directing staff to conduct the next survey based on a July 1, 1978 valuation date, staff recommends that the full value standard for city and town assessment rolls completed in 1978 be based on the simple average of the 1974 and 1976 survey data.

Since the rates on assessment rolls completed in 1977 were based on the 1974 survey data, which had a valuation date of July 1, 1974, averaging this data with the 1976 survey data, with its July 1, 1976 valuation date, will result in a full value standard which approximates July 1975 values. This would be a movement of 12 months from the full value standard used to compute the rates on the 1977 assessment rolls, July 1974 to July 1975. The attached Table A indicates the full value standards upon which rates

were based for assessment rolls from 1972 through 1977, the proposed standard for rates on 1978 assessment rolls, and a pattern which could logically be followed in future years should the Board so desire.

It should be pointed out that the most current full value standard possible for rates on the 1978 rolls would be to use only the 1976 survey data. This, of course, would be moving the standard 24 months from July 1974 to July 1976. It would also mean that rates on the assessment rolls completed in 1979 would also be based on this standard since the next survey (1978) will not be completed until October, 1980. To follow a pattern of moving the standard 24 months one year and have no movement the next year does not seem to be as desirable as the proposed constant 12 month annual movement of the standard. Therefore, it is recommended that the full value standard for city and town assessment rolls completed in 1978 be the average of 1974 and 1976 survey full value data.

**EXHIBIT F ANNEXED TO AFFIDAVIT OF MARK S. TULIS, MEMORANDUM OF STATE BOARD OF EQUALIZATION AND ASSESSMENT, DATED JUNE 14, 1979**

June 14, 1979

TO: State Board of Equalization and Assessment
FROM: Mr. Gaskell and Mr. Jones
SUBJECT: The Full Value Standard for Establishing Equalization Rates for City and Town and Village Assessment Rolls Completed in 1979.

The full value standard adopted by the Board for the 1978 village equalization rates was July 1, 1974. The Board adopted a simple average of the July 1, 1974 and July 1, 1976 as the standard for the 1978 equalization rates for cities and towns.

The 12 month difference between the village full value standard and that of the cities and towns was a result of the use of survey data from town assessment rolls as the basis for both village and town equalization rates. Since the timing of the completion of market value surveys has led to the use of the survey data first for town purposes in the spring, the village rates established in the fall, which are for a more current year, have by necessity been established using the same full value standard.

The assessment rolls being completed in 1979, however, are scheduled to be used with the results of the 1980 federal census in the computation of state revenue sharing allocations. It becomes necessary, therefore, to use a common full value standard for the 1979 equalization rates for all cities, towns and villages in the state.

Since the proposed full value standard for 1979 rates of cities and towns is July 1, 1976 (Board meeting July 18, 1978), it is recommended that this also be the standard for 1979 village rates.

This would mean the 12 month movement in the standard for cities and towns, as planned, and a movement of 24 months for villages.

It is more than likely that the 1978 survey will not be sufficiently complete for use for the 1980 village equalization rates. In this case, no movement in full value standard would be possible for villages from the 1979 to the 1980 equalization rates.

Therefore, it is recommended that the full value standard for city, town and village assessment rolls completed in 1979 be July 1, 1976.

**EXHIBIT G ANNEXED TO AFFIDAVIT OF MARK S. TULIS, LETTER DATED FEBRUARY 7, 1977 FROM ROBERT L. BEEBE, ESQ.**

February 7, 1977

Mr. Alan J. Underberg
Goldstein, Goldman, Kessler
and Underberg
1800 Lincoln First Towers
Rochester, New York 14604

Dear Mr. Underberg:

The attached material has been assembled by the staff in preparation for the forthcoming Board meeting. Because the decision of the Board is critical to the establishment of equalization rates for 1976 assessment rolls, several preliminary observations would seem to be appropriate.

A first principle in this process is that property values are customarily related to a specific point in time. For each survey undertaken pursuant to section 1200 of the Real Property Tax Law, all real property is appraised as of a specific point in time designated as the *valuation date* for the survey. Each appraisal, regardless of when made, will reflect the value of the property as of valuation date (although the value will be based on a different inventory date, depending upon the assessment roll from which the property was selected). For purposes of a specific survey, the valuation date is also the mid-point of the time period from which the property sales used in the rate process are taken.

A corollary of this first principle applies to the determination of value for equalization rate purposes. That is, theoretically, application of the equalization rate determined full value as of a specific point in time. However, in order to differentiate between a specific survey and the annual rate-making process the point

in time for rate-making purposes is designated as the *full value standard.* When an equalization rate is based exclusively upon data derived from a single survey, the valuation date and the full value standard are the same. However, when data from two or more surveys are combined, a new full value standard is necessarily created and will reflect the mid-point in time between the valuation dates (if the surveys are weighted equally). If one survey is given more weight than another, then the full value standard will move in accordance with the weighting.

Traditionally, the determination of valuation date and the *survey period* (within which sales are collected) has been a determination made by staff. However, the establishment of the full value standard for equalization rate purposes is most definitely the responsibility of the Board.

In the past, upon completion of a new survey, the policy of the Board has been to combine the new data with the prior survey data in the first year that the new data is available. This practice slows the forward movement of the full value standard and tends to make a smoother transition between successive surveys. In addition, it gives staff another year to refine the new survey data. In the following year, the Board has then customarily used the newer survey data as the sole basis for the full value standard.

In combining surveys, when the survey required two years to complete, the two surveys were combined by giving equal weight to each survey. However, on those occasions when a survey required three years to complete, the results of the two surveys were combined by giving double weight to the more recent survey data and single weight to the older survey data.

The 1973 survey data is based upon a valuation date of January 1, 1973, and such data was used alone to establish rates for 1975 assessment rolls. The 1974 survey is based upon a valuation date of July 1, 1974. The 1974 survey is nearly complete, and staff estimates that it will be complete by March 15th, or soon thereafter, and that it will be available for establishing rates for 1976 assessment rolls.

In recent years a group of senior staff members, designated as the Equalization Rate Advisory Council (ERAC), has periodically met to discuss policy questions and to provide recommendations to the Executive Director. This Council has been reconstituted to include representatives of each operating bureau, Counsel and several senior staff members. The attached material has been developed by ERAC in order to analyze the factors to be considered in determining the full value standard for equalization rates established for 1976 assessment rolls.

Table 1A shows the full value standards used for equalization rates based on assessment rolls completed in 1971 through 1975 and proposed standards through 1979.

Table 1B displays these proposed standards graphically.

Table 2A shows the impact of the nine months movement (averaging 1973 survey and 1974 survey data with equal weights), and Table 2B shows the impact of using 1974 data alone (an advance of 18 months in the full value standard).

Tables 3A and 3B show the sequence of tasks and approximate time frame in which they must take place if the staff recommendation is adopted.

The deliberations of ERAC and staff would appear to indicate four potential full value standards for equalization rates established for 1976 assessment rolls. These four alternative standards are:

1. 1973 survey data alone

2. 1974 survey data alone

3. 1973 and 1974 survey data equally weighted

4. 1973 and 1974 survey data unequally weighted.

The first of these alternatives, using survey data alone, it is suggested, would:

1) Result in use of the same full value standard used for equalization rates established for 1975 assessment rolls,

2) Minimize the change in equalization rates and the resulting redistribution of local taxes, and

3) Postpone readjustments which should take place in the interest of equalization.

The second alternative, using the 1974 survey data alone, it is suggested, would:

1) Establish a precedent for use of new survey data alone in the first year of its availability,

2) Result in relatively drastic changes in equalization rates and consequent full value changes producing tax shifts which many localities would find difficult to absorb.

The third alternative, equal weighting of the 1973 and 1974 survey data, it is suggested, would establish a full value standard of October 1, 1973, which is mid-point between the valuation dates of the two surveys. Using this alternative would:

1) Bring about desired readjustments of the full value base in many localities, but at a reduced impact,

2) Lessen the impact of the adjustment which would occur with the second alternative, and

3) Will permit additional forward readjustment next year without the necessity of completing a new survey.

The fourth alternative, unequal weighting of the 1973 and 1974 survey data, it is suggested, is without any particular merit, since the time between the two valuation dates is only eighteen months. In prior surveys, when the time period between valuation dates has been extended to three years, the Board has used weighted averaging instead of averaging with equal weights.

Members of the staff are available to discuss these alternatives with you if you so desire.

Very truly yours,

Robert L. Beebe
Acting Counsel

Encl.

## TABLE 1A

## FULL VALUE STANDARDS FOR EQUALIZATION RATES BASED ON ASSESSMENT ROLLS COMPLETED IN 1971 THRU 1975, AND PROPOSED STANDARDS FOR ROLLS COMPLETED IN 1976 THRU 1979

| ASS'T. ROLL | SURVEYS | WGTS. | MKT. VAL. DATE | NO. OF MOS. FROM PRIOR MV DATE | MKT. VAL. TREND FOR MD. MUNIC. |
|---|---|---|---|---|---|
| 1979 | 1976 | 0-1 | 7/1/76 | 12 | 9.09[a] |
| 1978 | 1974-76 | 1-1 | 7/1/75 | 12 | 10.00[a] |
| 1977 | 1974 | 0-1 | 7/1/74 | 9 | 10.95 |
| 1976 | 1973-74 | 1-1 | 10/1/73 | 9 | 12.29 |
| 1975 | 1973 | 0-1 | 1/1/73 | 12 | 9.93 |
| 1974 | 1970-73 | 1-2 | 1/1/72 | 24 | 24.77 |
| 1973 | 1970 | 0-1 | 1/1/70 | 12 | 9.91 |
| 1972 | 1968-70 | 1-1 | 1/1/69 | 12 | 11.00 |
| 1971 | 1968 | 0-1 | 1/1/68 | | |

a) Assumes a market value trend between 1974 and 1976 of 20%.

## TABLE 1B

## PROPOSED FULL VALUE STANDARDS FOR EQUALIZATION RATES BASED ON ASSESSMENT ROLLS COMPLETED IN 1976 THROUGH 1979

**RECOMMENDED METHOD:** equally weights the current survey with the prior survey in the first year a new survey is available and uses the current survey alone in the second year.

| | Prior Survey / Current Survey | | | | |
|---|---|---|---|---|---|
| WEIGHTINGS: | 0 -1 | 1 -1 | 0 - 1 | 1 - 1 | 0 - 1 |
| | 1975 Equalization Rate | 1976 Equalization Rate | 1977 Equalization Rate | 1978 Equalization Rate | 1979 Equalization Rate |
| RECOMMENDED METHOD | 9 mos. | 9 mos. | 12 mos. | 12 mos. | |
| MARKET VALUE DATE LINE | 1/1/73* | 10/1/73 | 7/1/74* | 7/1/75 | 7/1/76* |

* SURVEY POINT

TABLE 2A

FREQUENCY DISTRIBUTION OF MUNICIPALITIES ACCORDING TO THE *NINE MONTH* MARKET TREND FROM THE 1973 SURVEY[1] TO A SIMPLE AVERAGE OF THE 1973 AND 1974 SURVEYS[2]

| NINE MONTH PERCENT INCREASE IN MARKET VALUE | PERCENT OF TOTAL MUNICIPALITIES[3] | ESTIMATED[3] NUMBER OF MUNICIPALITIES | PERCENT OF TOTAL MARKET VALUE | CUMULATIVE PERCENT OF TOTAL MARKET VALUE |
|---|---|---|---|---|
| LESS THAN 0 | 2.0 | 20 | 1.0 | 1.0 |
| 0 TO 5 | 10.7 | 106 | 47.2 | 48.2 |
| 5 TO 10 | 29.5 | 292 | 33.1 | 81.3 |
| 10 TO 15 | 22.8 | 225 | 8.8 | 90.1 |
| 15 TO 20 | 14.0 | 139 | 5.9 | 96.0 |
| 20 TO 25 | 9.9 | 98 | 2.1 | 98.1 |
| 25 TO 30 | 4.7 | 47 | 1.0 | 99.1 |
| 30 TO 35 | 4.3 | 43 | .6 | 99.7 |
| 35 TO 40 | .9 | 9 | .2 | 99.9 |
| 40 TO 45 | — | — | — | — |
| 45 TO 50 | .6 | 6 | .1 | 100.0 |
| GREATER THAN 50 | .6 | 6 | .04 | 100.0 |
| TOTAL | 100.0 | 991 | 100.0 | |

NINE MONTH MEDIAN TREND 11.13

[1] BASED ON JANUARY 1, 1973.

[2] SIMPLE AVERAGE OF JANUARY 1, 1973 AND JULY 1, 1974 IS OCTOBER 1, 1973.

[3] BASED ON 508 MUNICIPALITIES.

TABLE 2B

FREQUENCY DISTRIBUTION OF MUNICIPALITIES ACCORDING TO THE *EIGHTEEN MONTH* MARKET TREND FROM THE 1973 SURVEY[1] TO THE 1974 SURVEYS[2]

| EIGHTEEN MONTH PERCENT INCREASE IN MARKET VALUE | PERCENT OF TOTAL MUNICIPALITIES[3] | ESTIMATED[3] NUMBER OF MUNICIPALITIES | PERCENT OF TOTAL MARKET VALUE | CUMULATIVE PERCENT OF TOTAL MARKET VALUE |
|---|---|---|---|---|
| LESS THAN 0 | 2.0 | 20 | .9 | .9 |
| 0 TO 10 | 9.0 | 89 | 45.9 | 46.8 |
| 10 TO 20 | 27.7 | 274 | 33.3 | 80.1 |
| 20 TO 30 | 21.1 | 209 | 8.4 | 88.5 |
| 30 TO 40 | 14.6 | 145 | 4.8 | 93.3 |
| 40 TO 50 | 9.6 | 95 | 3.8 | 97.1 |
| 50 TO 60 | 6.9 | 68 | 1.5 | 98.6 |
| 60 TO 70 | 3.3 | 33 | .6 | 99.2 |
| 70 TO 80 | 2.8 | 28 | .4 | 99.6 |
| 80 TO 90 | 1.6 | 16 | .3 | 99.9 |
| 90 TO 100 | .2 | 2 | .04 | 99.9 |
| GREATER THAN 100 | 1.2 | 12 | .1 | 100.0 |
| TOTAL | 100.0 | 991 | 100.0 | |

EIGHTEEN MONTH MEDIAN TREND 23.82

[1] BASED ON JANUARY 1, 1973.
[2] BASED ON JULY 1, 1974.
[3] ESTIMATED ON 508 MUNICIPALITIES.

## PORTIONS OF EXHIBIT I ANNEXED TO AFFIDAVIT OF MARK S. TULIS, PORTIONS OF TRANSCRIPT OF HEARING OF SEPTEMBER 15, 1978

Mr. Beebe: Your Honor, the petitioners have woven such an incredible web of issues here that I am afraid we run the risk of losing sight of the simple and straight forward question that is before the court in this motion, and that is, is there a right to judicial review of the equalization rate for the petitioners? Now in their presentation the petitioners have made a series of points which have not addressed that issue and I would just like to list them quickly and comment on each. First of all, Mr. Cowan creates, I think, the issue of classification and he suggests that we are arguing that 606 is a classification statute. We did not raise the assessing. Now, Mr. Cowan also discussed at some length the purpose of the equalization portion of 606, and I believe he said that the legislature recognized that the State should do exactly what the local asessors were doing for so many years. I submit that that is a rather ingenious way of changing the purpose of that statute because, in fact, the assessors were not equalizing. They were failing to comply with 306 and the purpose of the provisions of 606 which says to the State Board to equalize is to put the assessment of the special franchise on the same ratio as the local assessments, which are not at full value because of the inaction of the assessors, not because the assessors are equalizing. In fact, the function of the State Board is to measure that non-action ratio that is created by the actions or inactions of the local assessors and to scientifically determine the average, and then to apply that to the special franchise so that it is not assessed at a higher ratio. Again, Mr. Cowan gets into the question of the rate and constitutionality with the rate of over a hundred per cent, and he suggested on the face of those rates there is a violation of Article 16 of the constitution. I find this difficult to understand because Mr. Cowan has also made a rather extensive point in regard to the age of the State Board data. If he understands the age of the State Board data, then he must surely understand that in producing an equalization rate from

somewhat aged data there must be occasions when assessments are updated and rates of over a hundred per cent. That does not mean that the assessment coming from those rates will be at more than full value, nor does it mean the assessor is assessing at more than full value. It merely means that the most current assessments at the local level are in excess of the full value of the rate which was determined several years before. And then, finally, I think it essential to again return to the question of what is the purpose of the statute and why is there is no judicial review? Section 306 does not say to the local assessor, "Assess at full value and then apply the equalization rate," and I submit if it did, the local property owner might not have a review of their equalization rate, either. Section 306 says assess at full value . . . .

# EXHIBIT O ANNEXED TO AFFIDAVIT OF MARK S. TULIS, LETTER FROM ROBERT L. BEEBE, ESQ. TO JOHN G. MCGOLDRICK, ESQ. DATED JULY 16, 1982

DAVID GASKELL
SECRETARY OF THE BOARD

ROBERT L. BEEBE
COUNSEL

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE BOARD OF EQUALIZATION AND ASSESSMENT
AGENCY BUILDING #4 - EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223

July 16, 1982

Hon. John G. McGoldrick
Counsel to the Governor
Executive Chamber
State Capital
Albany, New York 12224

Dear Mr. McGoldrick:

Re: Assembly Bill No. 13057
By: Committee on Rules

The attachments to this letter summarize in detail the recodification which would be accomplished by the above-captioned bills. As described in those materials, the provisions to be recodified relate to the administrative and judicial review of assessments. These provisions, currently located in Articles 5, 15-A and 7 of the Real Property Tax Law, are a combination of sections of law previously recodified from several statutes in 1958 (c.959) and a series of post 1958 amendments to the Real Property Tax Law.

Among the most significant of the recent amendments are those creating the so-called independent board of assessment review (L.1970, c.957), the small claims assessment review program (L.1981, c.1022) and the classification concept of new Articles 18

and 19 (L.1981, c.1057). The above-captioned bill would consolidate these provisions and modernize some of the terminology, particularly by the addition of definitions. The resulting new title 1-A of Article 5 for administrative review and revised titles 1 and 1-A of Article 7 for judicial review would provide a clear statutory structure of the review of assessments.

We are aware that a minor technical problem would apparently be created by the enactment of both this bill and Senate 9184-B (i.e., Real Property Tax Law, §514), but that problem can easily be resolved by an amendment next year.

Bill section 24 of the above-captioned bill would overrule the decisions of the Court of Appeals and Special Term[1] on the issues of pleading and proving inequality in the ongoing litigation between Consolidated Edison and the State Board. Although our position in this aspect of the litigation was upheld by Judge Koreman at Special Term, on appeal, the Appellate Division reversed and the Court of Appeals affirmed the Appellate Division.[2] All of the dissenting judges, Greenblott in the Appellate Division, and Cooke, Jones and Meyer of the Court of Appeals, recorded their agreement with our position on the basis of Judge Koreman's opinion.

On the other hand, the opinion of Judge Mahoney, which was the basis for the four votes in the Appellate Division and the four votes in the Court of Appeals, concluded that "We cannot agree . . . that it was the Legislature's intent to foreclose special franchise owners from attempting to prove the inequality of their assessments." Clearly, the passage of the above-captioned bill indicates that this was and is precisely the Legislature's intent.

---

[1]*Consolidated Edison v. State Board of Equalization and Assessment*, S.Ct., Albany Co., January 25, 1982, Lowery, J.

[2]*Consolidated Edison v. State Board of Equalization and Assessment*, 98 Misc.2d 491, *rev.*, 73 App.Div.2d 31, *aff'd*, 53 N.Y.2d 975 (opinions enclosed).

The lawsuit was commenced because Consolidated Edison wants a fundamental change in the valuation methodology used by the State Board for special franchise properties. In our judgment, the most significant reason for the very existence of the ratio issue in this litigation is the confusion of the past several years in regard to the use of the equalization rate in certiorari proceedings commenced by owners of non-special franchise property (Real Property Tax Law, Article 7). The several statutory amendments beginning in 1977 and culminating in chapter 1057 of the Laws of 1981, have produced a host of judicial decisions, many of which are ambiguous and some of which reflect the inconsistent statutory amendments.[3] Consolidated Edison understandably took advantage of this situation, particularly with respect to the *Standard Brands*[4] decisions and chapter 126 of the Laws of 1979.

The resulting judicial interpretations in this litigation hold that Consolidated Edison may prove ratio and that in special assessing units the equalization rate is not even admissible. These decisions effectively supersede section 606, which directs the Board to use the latest state equalization rate or special equalization rate. In addition, the decisions reject the separate and distinct treatment of special franchise properties.

For purposes of the administration of the special franchise assessment program (Real Property Tax Law, Article 6), we believe the *Consolidated Edison* decisions place the State Board (and, necessarily, the municipalities in which special franchise property is located) in an untenable position. In effect, the equalization rate, which must be used by the State Board pursuant to section 606, cannot be defended in court.

---

[3]These amendments and decisions, with which you are quite familiar, are summarized in the recent Court of Appeals opinion in the *J.A. Green* case, a copy of which is also enclosed.

[4]Standard Brands [citation omitted]

Based upon our exhaustive analyses of classification and delegation associated with Senate 7000-A of 1981, we believe that in terms of constitutional law it is certain that the Legislature may single out special franchise property for separate tax treatment. Indeed the constitutionality of Article 6 was upheld in *Metropolitan Street Railway* (174 N.Y. 417), and the system which would be codified by this bill was specifically addressed by Judge Koreman in terms of constitutional issues. In addition, there is no indication in either the Appellate Division reversal or the Court of Appeals affirmance that the appellate courts were concerned with that possibility.

There remains the retroactive effective date (bill section 29) which we recognize may become an issue in the litigation. We believe that a strong case can and will be made for the constitutionality of the provision. In our judgment, it is essential to make the distinction between the special franchise proceeding (wherein ratio is fixed by section 606) and all other non-special franchise Article 7 proceedings, wherein ratio is one of the factors which must be proven (Real Property Tax Law, §720(3); *see also*, Real Property Tax Law, §305(2)).

Bearing in mind this distinction, we believe the language of *Slewett & Farber, Colt* and *J.A. Green* is more than adequate support for the proposition that the effect of this legislation, which would precede the entry of any judgment on ratio in this litigation, may be made retroactive.

Finally, we note two important factors. First, the legislation would in no way foreclose Consolidated Edison (or any special franchise owner) from the review of the full value of the property. And, second, the larger portion of the utility industry's property, the non-special franchise properties (which *are* generally overassessed by local assessors (consider the treatment of class three property in new Article 18) is eligible for assessment review under Article 7, with proof of ratio pursuant to section 720(3).

Both because of the utility of the recodification and because of the urgency of the special franchise administrative provision, we respectfully urge that the above-captioned bill be approved.

Very truly yours,

/s/

Robert L. Beebe

Attachments:

cc: Mr. Gaskell
Members of the State Board
of Equalization and Assessment

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF EQUALIZATION AND ASSESSMENT

July 8, 1982

TO: Mr. Beebe

FROM: Michael E. Kupferman

SUBJECT: Assembly Bill No. 13057
By: The Committee on Rules

This bill would recodify the provisions of the Real Property Law and the Real Property Tax Law relating to administrative, judicial and small claims judicial review of assessments, and judicial review of State Board determinations of county equalization and state equalization rates. The subject bill would also amend Real Property Tax Law Section 744(1) to provide that in a judicial proceeding to review a special franchise assessment, the state equalization or special equalization rate used in determining the special franchise assessment shall be binding and conclusive on the parties.

The attached Memorandum in Support of the subject bill sets forth in great detail the contemplated recodification and includes a distribution table. References in the memorandum to Real Property Law section 339-y(2) are incorrect (Real Property Law §339-y(2) was renumbered subdivision (4) by L.1981, c.1052); however, the subject bill contains the proper statutory references. The need for the recodification is set forth in the memorandum at page 11 *et. seq.*. Rather than repeating the detail contained in the memorandum, the following is a summary of the major features of the recodification.

*Administrative Review of Assessments* (Bill sections 1-10 and 28)

As a result of the enactment of the so-called Assessment Improvement Law of 1970 (L.1970, c.957), the statutory provisions governing administrative review of assessments are located in Articles 5 and 15 of the Real Property Tax Law. The subject bill would repeal Real Property Tax Law sections 512(1), 512-a, 1524 and 1526 and reenact the substance of these provisions in a new title one-a, located within Article 5 of the Real Property Tax Law, entitled "Administrative Review of Assessments". This is desirable because administrative review of assessments is an integral part of the process of preparing assessment rolls. Moreover, consolidation of these provisions into one title would make it easier for taxpayers and local officials to understand the administrative review process.

The provisions of the new title would also modernize the terminology used to describe the grounds for administrative review, and as modified, would set forth comprehensive definitions of the various grounds for administrative review. In view of the enactment of chapters 1022 and 1057 of the Laws of 1981, which established three separate definitions of inequality and established misclassification as an entirely new ground for review and provided for transition assessments and limitations on increases in assessed value, this aspect of the subject bill is particularly desirable.

Further, the new title would clarify an ambiguity concerning the right of a taxpayer to file a complaint with the board of assessment review at an adjourned hearing date. Under present law, a taxpayer may file a complaint with the assessor prior to the hearing of the board of assessment review or with the board of assessment review at such hearing or at any adjourned hearing (RPTL, §1526(3)). However, Real Property Tax Law section 512(2) provides only that the board of assessment review "shall have authority to accept a complaint on any adjourned day." The new title would make these provisions consistent by preserving the authority of the board of assessment review to accept a complaint on any adjourned hearing date, but limiting a taxpayer's right to file a complaint at such time to instances where such a procedure is "authorized" by the board of assessment review.

*Judicial Review of Assessments* (Bill sections 11-19)

Chapter 1057 of the Laws of 1981 established one definition of inequality for special assessing units and another for all other assessing units. As a result, there are now two sections in title one of Article 7 of the Real Property Tax Law – section 706 which is applicable to assessing units other than special assessing units and section 707 which is applicable to special assessing units – governing the contents of petitions for judicial review. The subject bill would repeal Real Property Tax Law section 707 and would amend Real Property Tax Law section 706 to apply to all assessing units.

The grounds for judicial review would be set forth in Real Property Tax Law section 706 and comprehensively defined in a new Real Property Tax Law section 701. The definitions would separately define the term "unequal assessment" for special assessing units and for all other assessing units. The definitions would also clarify several other ambiguities created by chapter 1057 by defining misclassification, and by providing for judicial review of transition assessments and of judicial review of the application of assessment limitations, taking into account the differences between special assessing units and all other assessing units. Additionally, the terminology used to describe the grounds for judicial review would be modernized throughout title one of Article 7 of the Real Property Tax Law. These features of the subject bill are similar to the changes that would be made in relation to administrative review and would facilitate taxpayer and local official understanding of the judicial review process.

*Small Claims Judicial Review of Assessments* (Bill sections 20-23)

Title one-a of Article 7 of the Real Property Tax Law would be amended by modernizing the terminology used to describe the grounds for review and by adding a new section 729 defining the grounds for small claims judicial review. These changes are similar to the changes that would be made in connection with administrative and judicial review and would also facilitate understanding by the public.

*Judicial Review of State Board Determinations in Relation to County Equalization and State Equalization Rates* (Bill sections 25-27)

Real Property Tax Law section 760 would be repealed. The substance of this provision would be recodified as new Real Property Tax Law sections 830 and 1218.

With respect to proof of ratio in a judicial proceeding to review a special franchise assessment, Real Property Tax Law section 744(1) currently provides that in such a proceeding ". . . the court may take evidence as it may deem necessary . . . and hear and determine all questions raised by the petition and the answer thereto." In *Consolidated Edison Company of New York v. State Board of Equalization and Assessment, 73 A.D.2d 31,* 425 N.Y.S.2d 651 *(1980) aff'd 553 N.Y.2d 975,* 441 N.Y.S.2d 669 *(1981),* the Court held that ratio is an issue which may be litigated in a judicial proceeding to review a special franchise assessment alleged to be unequal, and that ratio may be proved by any of the methods set forth in Real Property Tax Law, section 720(3) (i.e., select parcel method, analysis of actual sales or introduction of the state equalization rate). The subject bill (bill section 24) would supercede this Court decision by making the State equalization rate conclusive and binding upon the parties on the issue of whether a special franchise assessment is unequal.

If approved, the bill would become effective on January 1, 1983, except that the provision relating to judicial review of special franchise assessments would take effect immediately and apply to any proceeding commenced on or after January 1, 1973 and not finally determined as of the effective date hereof and to all proceedings hereafter commenced.

# REPLY AFFIDAVIT OF MARK S. TULIS IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,

*Respondents and Intervenors-Respondents.*

REPLY AFFIDAVIT

Index Nos. 11747/74 et al.

(168 Proceedings)

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

MARK S. TULIS, being duly sworn, deposes and says:

1. I am associated with the firm of Wien, Malkin & Bettex, Special Counsel for Petitioner Consolidated Edison Company of New York, Inc. ("Con Edison").

2. I am fully familiar with the matters herein referred to and make this affidavit in further support of Con Edison's cross-motion for a determination and order declaring that the provisions of Real Property Tax Law ("RPTL") §744(1), as amended by L. 1982 chs. 24 and 29, violate the provisions of the Constitution of the State of New York and the Constitution of the United States and are unconstitutional and void, and in opposition to

the motion for partial summary judgment of the respondent The State Board of Equalization and Assessment ("State Board") and certain intervenors-respondents.

3. This reply affidavit is submitted to clarify several errors contained in the respondents' briefs.

4. Some of the respondents still incorrectly insist that Con Edison was afforded an opportunity to contest the determination of the state equalization rates. The rates and Con Edison's assessments are actually determined as follows:

a. The State Board intitially determines tentative equalization rates and conducts hearings with respect to their determination.

b. As noted by the Appellate Division and Court of Appeals "only municipalities are given notice of the SBEA's tentative State equalization rates and afforded a hearing thereon."

c. Subsequently, Con Edison receives a notice of tentative assessed valuation from the State Board with respect to its special franchise property. The assessment is apparently determined by multiplying the full value of the special franchise property times the tentative equalization rates determined with respect to the prior year. Such notice does not indicate the tentative equalization rate which has been utilized, but rather gives a single figure. A copy of such a notice is annexed as Exhibit S.

d. Although Con Edison does submit a statement to the State Board at the hearing held with respect to the tentative assessed valuation in which claims of inequality of assessment are asserted, the State Board has refused to consider such evidence.

e. As noted by the State Board at page 39 of its brief to the Court of Appeals on the issue of inequality:

> "The State Board has consistently not permitted any challenge to the equalization rate in hearings on the assessment of special franchise property."

f. After the hearing, Con Edison recieves a notice of final assessment for its special franchise property, which, like the tentative notice, does not indicate which equalization rate is used. The final assessment is apparently determined by multiplying the full value of the special franchise property times the final equalization rates determined for the prior year, the determination of which Con Edison has been barred from challenging or from even introducing evidence.

g. It is clear that respondents' contention that Con Edison has been afforded a hearing with respect to inequality or the determination of the equalization rates is baseless.

5. Respondents have contended that Con Edison has no economic interest in these proceedings, as it has already passed on the taxes to its ratepayers. This is factually incorrect.

a. Real property taxes are passed on to Con Edison's customers by use of a complicated formula, which results in a substantial portion of the tax being absorbed by the shareholders of Con Edison. Annexed as Exhibit T are the relevant pages of Public Service Commission order No. 76-3, which implemented the formula.

b. Moreover, Con Edison is adversely affected by higher taxes, even when passed on to its ratepayers, since higher rates reduce demand, cause users to shift to alternate energy sources, or even relocate, thereby impairing Con Edison's long-term profit potential and, possibly, its viablity.

c. As evidence of the importance of these proceedings to Con Edison's customers and stockholders, Con Edison paid $108,267,465 in 1974, $123,351,578 in 1975, $144,901,398 in 1976, $157,788,326 in 1977, $164,629,865 in 1978 (the years before the Court) and $217,016,199 in 1982 in special franchise real property taxes.

6. Annexed as Exhibit U (under separate cover) is a true copy of the brief submitted to the Court of Appeals by Con Edison

on the issue of inequality. Annexed as Exhibit V are true copies of certain documents detailing the legislative history of the predecessor to RPTL §606 which are referred to in Con Edison's Court of Appeals brief and which appear at pages 170 through 176 and 178 of the Record of Appeal to the Court of Appeals.

7. Annexed as Exhibit W is a true copy of certain portions of the transcript of a hearing held before Special Term, Judge Koreman presiding, on September 15, 1978, at which the original motions regarding inequality were argued.

8. Annexed as Exhibit X is the 1976 Petition for Review served by Con Edison with respect to the 1976 special franchise assessments for the Village of Pleasantville.

9. Annexed as Exhibit Y is a portion of a brief submitted by the City of New York to the Appellate Division, First Department in connection with *Colt Industries, Inc. v. Finance Administrator, City of New York.*

WHEREFORE, it is respectfully urged that: 1) the cross-motion for a determination and order declaring that the provisions of RPTL §744(1), as amended by L. 1982 chs. 24 and 29 violate the provisions of the Constitutions of the State of New York and the Constitution of the United States and are unconstitutional and void be, in all respects, granted; 2) alternatively, the Court convert the inequality aspect of the within proceedings to CPLR Article 78 proceedings; 3) the renewed motion for partial summary judgment be denied; and 4) the Court grant such further relief as may seem just or appropriate in the circumstances.

/s/ Mark S. Tulis

Mark S. Tulis

Sworn to before me this
24th day of March 1983.

/s/ Jo-Ella D. Spruill

Notary Public

JO-ELLA D. SPRUILL
Notary Public, State of New York

EXHIBIT S TO REPLY AFFIDAVIT OF MARK S. TULIS
CERTIFICATE OF FINAL SPECIAL FRANCHISE ASSESSMENT
To be placed on assessment roll completed, verified and filed in 1983
DATED MARCH 2, 1983

CON. EDISON CO. OF N.Y.
4 IRVING PLACE ROOM 200
NEW YORK, NEW YORK 10003
C/O CLEVELAND HALL

Notice is hereby given that the State Board of Equalization and Assessment has determined the final assessments of the special franchises of the named special franchise owners for the assessing units stated herein, at the amounts shown below. The assessments include both the value of the tangible property situated in, upon, under or above public streets, highways, waters and other public places and the value of the franchise, right, authority or permission to occupy such public street, highways, waters and other public places.

COUNTY OF WESTCHESTER
11070-5548014 VIL PORT CHESTER
T RYE
PAGE 1 OF 1

FINAL ASSESSMENTS 2,212,981

Rec. 3-7-83
Tax Dept

I hereby certify that the above assessments are the final special franchise assessments as determined in accordance with Section 600 of the Real Property Tax Law.

/s/ _____

AFFIDAVIT OF JOHN P. MACARTHUR IN RESPONSE TO REPLY AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,

*Respondents and Intervenors-Respondents.*

AFFIDAVIT IN RESPONSE TO REPLY AFFIDAVIT

Index Nos. 11747/74 et al.

(168 Proceedings)

STATE OF NEW YORK )
: ss.:
COUNTY OF ALBANY )

JOHN P. MacARTHUR, being duly sworn, deposes and says:

1. That he is of counsel to Hon. Frederick A.O. Schwarz, Jr., Corporation Counsel, City of New York, an Intervenor-Respondent in these proceedings; is fully familiar with the matters herein concerned; and respectfully makes this Affidavit in response to the Reply Affidavit submitted on behalf of Petitioner herein.

2. With respect to paragraph 4(c) of the Reply Affidavit and Exhibit S referred to therein, the Exhibit appears, by its terms, to be not the notice of tentative assessment referred to in the Affidavit but rather the notice of final assessment, which is sent

out after the hearing on the tentative assessment has been held and all appropriate rulings and decisions made thereon. The Petitioner has long since been informed with respect to the applicable equalization rate, which by law is a matter of public record and has been on file in the offices of the Chief Executive Officer of the municipality concered, the Clerk of the Board of Supervisors, the Office of the State Controller, and also SBEA's own offices for the preceding year, as provided in RPTL § 1212.

3. With respect to paragraph 5(a) and Exhibit T of and to the said Reply Affidavit, the Affidavit is not borne out by the Exhibit. The gist of the Affidavit is that Petitioner's shareholders absorb a "substantial portion of the tax". The gist of the Exhibit is that all of the tax is passed through to the rate payers except for 25% of any *increase* in the assessment (Ex. T, p. 28). The increase in taxes from 1974 to 1975 was $15,084,113, or about 11.4% over the prior year's $108 million. Upon information and belief, during this period the tax rate in the City of New York increased from an effective 7.353% to 8.187%, about 11.3%, which would account for almost all of the increase, all recoverable from rate payers. Even if this were not the case, and there had been no increase in tax rate at all, the maximum amount not passed through to the rate payers would have been 25% of the $15 million increase, or about $3.77 million, hardly a "substantial portion" of Petitioner's $4 billion operating income.

4. With respect to the balance of the Exhibits to the said Affidavit, it is difficult to respond to them because it is nowhere suggested for what purpose they have been annexed. As to Exhibit Y, however, the fact is that the *Colt Industries* proceedings, which had to do in any event with conventional real property and not a special franchise, culminated in the decision of the Court of Appeals to which the Court's attention has been respectfully invited heretofore, and which held that State Rate was entirely acceptable.

/s/

Sworn to before me this
7th day of April, 1983.

/s/ Doris Andrusky

DORIS ANDRUSKY
NOTARY PUBLIC, State of New York
Qualified in Columiba County
Commission Expires March 30, 1984

## REPLY AFFIDAVIT OF MICHAEL WHITEMAN

## SUPREME COURT OF THE STATE OF NEW YORK
## COUNTY OF ALBANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

– against –

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

*Respondent and Intervenors-Respondents.*

## REPLY AFFIDAVIT

Index Nos 11747/74 et al.

STATE OF NEW YORK )
) ss.:
COUNTY OF ALBANY )

MICHAEL WHITEMAN, being duly sworn, deposes and says:

1. I am a member of Whiteman Osterman & Hanna, attorneys for Intervenors-Respondent, the Towns of Greenburgh, Harrison, New Castle, Ossining and Yorktown, the Villages of Ardsley, Briarcliff Manor, Bronxville, Elmsford, Mount Kisco, Ossining, Pelham and Pleasantville and the City of Peekskill (the "Westchester Municipalities"). I am fully familiar with the matter herein concerned and respectfully make this affidavit in response to the reply affidavit of Mark Tulis and the memorandum of law submitted on behalf of petitioner herein and in support of the respondents' motion for partial summary judgment.

2. In paragraph 5 of the Tulis reply affidavit, Mr. Tulis erroneously ascribes to the respondents the claim that Con Edison has no economic interest in these proceedings. The essential point

made by respondents was and is, however, that Con Edison can claim no surprise and no prejudice in any retroactive application of the provisions of RPTL §744 (1), as amended. See, *e.g.*, pp. 102-103, 113-115 of the memorandum of law submitted on behalf of the Westchester Municipalities.

3. As to the nature and extent of Con Edison's economic interest, the Tulis reply affidavit refers to Opinion No. 76-3 of the Public Service Commission in Case 26827 (lengthy excerpts of which are annexed to the Tulis reply affidavit as Exhibit T) pursuant to which, according to Mr. Tulis, "a substantial portion of . . . [Con Edison's real property taxes is] absorbed by the shareholders of Con Edison." Tulis reply affidavit, ¶5. That contention is repeated in Con Edison's reply memorandum in footnote 11 at page 49.

4. Contrary to Mr. Tulis' assertion, the Public Service Commission's order did not require Con Edison's shareholders to absorb a substantial share of Con Edison's real property taxes for any period or, for that matter, any share for a substantial period.

5. The Commission's order simply denied Con Edison the right automatically to pass on a small portion—25 percent—of real property tax increases attributable to increases in assessments without a plenary hearing in a general rate case, i.e., for the brief period between rate cases. The Commission explained this policy as an incentive to utilities to "pursue diligently a program to ensure that the assessments on their property are equitable." Inasmuch as, on information and belief, general rate cases take approximately 11 months and major utilities in this State almost always have a general rate proceeding pending, the Commission's order can hardly be viewed as a substantial economic burden on utility shareholders, however much incentive it may have provided.

6. Moreover, on information and belief, very shortly after the Public Service Commission's 1976 order in Case 26827, the Commission reduced the portion of real property tax increases attributable to assessment increases that could not be passed along to rate payers automatically between rate hearings from 25 percent to 10 percent.

7. Finally, in Opinion No. 79-8 in Case 27353, the Public Service Commission lifted entirely the restriction it had imposed upon the amount of real property tax increases that Con Edison is allowed to flow through to consumers between formal rate proceedings. Copies of the pertinent pages of Opinion No. 79-8 are annexed hereto as Exhibit A.

WHEREFORE, respondents' motion for partial summary judgment should be granted.

/s/ Michael Whiteman
MICHAEL WHITEMAN

Sworn to before me
April 13, 1983

/s/ Ann M. Walsh

ANN M. WALSH
NOTARY PUBLIC, State of New York
Residing in Albany County
Commission Expires March 30, 1984

## OPINION OF THE NEW YORK COURT OF APPEALS
(53 N.Y. 2d 975)

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Respondent,*

—v—

STATE BOARD OF EQUALIZATION and ASSESSMENT,

*Appellant,*

—and—

VILLAGE OF PLEASANTVILLE et al.,

*Intervenors-Appellants.*

Argued April 29, 1981; decided June 2, 1981

### APPEARANCES OF COUNSEL

*Robert Abrams, Attorney-General* (*Shirley Adelson Siegel, Vernon Stuart* and *Michael S. Buskus* of counsel), for appellant.

*Michael Whiteman* and *Melvin H. Osterman, Jr.*, for Westchester Municipalities, intervenors-appellants.

*Marvin S. Fink* for Village of Scarsdale, intervenor-appellant.

*Henry J. Smith* for City of Mount Vernon and others, intervenors-appellants.

*Allen G. Schwartz, Corporation Counsel* (*John P. McArthur* of counsel), for City of New York, intervenor-appellant.

*Martin B. Cowan, Ernest J. Williams, Robert G. Desmond, Robert A. Machleder* and *Mark S. Tulis* for respondent.

## OPINION OF THE COURT

Order affirmed, with costs, for reasons stated in the opinion by Presiding Justice A. FRANKLIN MAHONEY at the Appellate Division (73 AD2d 31). Question certified answered in the affirmative.

Concur: Judges JASEN, GABRIELLI, WACHTLER and FUCHSBERG. Chief Judge COOKE and Judges JONES and MEYER dissent and vote to reverse for reasons stated in the opinion by Justice HAROLD E. KOREMAN at Special Term (98 Misc 2d 491).

## OPINION OF THE APPELLATE DIVISION, THIRD DEPARTMENT (73 A.D.2d 31)

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

—v—

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Respondent,*

—and—

VILLAGE OF PLEASANTVILLE et al.,

*Intervenors-Respondents.*

Third Department, February 21, 1980

### APPEARANCES OF COUNSEL

*Ernest J. Williams* (*Wien, Lane & Malkin [Martin B. Cowan]* of counsel), for appellant.

*Robert Abrams, Attorney-General* (*Vernon Stuart, Jeremiah Jochnowitz* and *Shirley Adelson Siegel* of counsel), for respondent.

*Allen G. Schwartz, Corporation Counsel* (*John P. MacArthur* of counsel), for City of New York, intervenor-respondent.

*Whiteman, Osterman & Hanna* (*Melvin H. Osterman, Jr.*, of counsel), for Westchester Municipalities, intervenor-respondent.

### OPINION OF THE COURT

MAHONEY, P.J.

The sole issue presented for our determination is whether, in a proceeding to review the assessment of a special franchise, the owner thereof may contest that assessment on the basis of inequality.

Petitioner is a public utility and the owner of numerous special franchises in the City of New York and the Counties of Westchester and Rockland. The State Board of Equalization and Assessment (SBEA) is vested with the exclusive authority to determine the assessed valuation of all special franchise property located in this State (Real Property Tax Law, § 600). Alleging that its special franchise assessments for the tax years 1974 through 1978 have been unequal, overvalued and illegal, petitioner commenced 168 proceedings against the SBEA involving 44 different taxing units, many of which have been allowed to intervene. Following consolidation of the proceedings, the SBEA and various intervenors moved for partial summary judgment dismissing those portions of the petitions which sought to establish inequality by proof of current sales in each of the taxing units. Noting that such proof would be admissible in the normal proceeding to review a real property assessment pursuant to subdivision 3 of section 720 of the Real Property Tax Law, Special Term granted the requested relief and held that the Legislature had formulated different review procedures for special franchise assessments to which section 720 was not applicable. This appeal by the petitioner ensued.

This is not the first time this proceeding has come before this court. In *Matter of Consolidated Edison Co. of N.Y. v State Bd. of Equalization & Assessment* (60 AD2d 356), we held that petitioner sought relief on the basis of inequality in its complaint before the SBEA and thus was not precluded from seeking judicial review of that issue due to a failure to first seek administrative redress. We expressly refrained, however, from determining whether petitioner's claim of inequality (1) had any merit or (2) was a proper ground for judicially attacking a special franchise assessment (60 AD2d 356, 360). It is this second issue which is now before us on this appeal.

An understanding of the history of special franchise assessments is necessary for resolution of this issue. The State Board of Tax Commissioners was first authorized in 1899 to assess special franchises (L 1899, ch 712). Assessments were to be made at full value

with no provision for equalization. Since local authorities rarely, if ever, assessed real property at full value,[1] special franchise owners were required to bring certiorari proceedings in order to have their assessments equalized (see, e.g., *People ex rel. New York Cent. & Hudson Riv. R.R. Co. v Priest*, 206 NY 274; *People ex rel. Hudson & Manhattan R. R. Co. v State Bd. of Tax Comrs.*, 203 NY 119; *People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.*, 196 NY 39). A flood of litigation resulted and, in 1911, the Legislature empowered the State Board of Tax Commissioners to equalize special franchise assessments through the application of rates devised by the board (L 1911, ch 804). These rates were used solely for the purpose of equalizing special franchise assessments, and special franchise owners were given notice of both the full and equalized value of their property with an opportunity for separate hearings on each. Following the replacement of the State Board of Tax Commissioners with the State Tax Commission in 1915, the Legislature provided, in 1916, for a single hearing on the questions of full valuation and the rate of equalization (L 1916, ch 334).

Thereafter, in 1949, the task of assessing special franchises was assigned to a temporary commission known as the SBEA.[2] This commission was also assigned the duty of reviewing and revising the State equalization rates although, at that time, these rates were not applied to special franchises for the purpose of equalization. It was not until 1953 that the Legislature, recognizing the work done by the temporary SBEA in revising the State equalization rates, directed that special franchises be assessed by applying the "latest state equalization rate" to the property's full value (L 1953, ch 874). Prior to this, special franchise owners, who had

---

[1] Section 306 of the Real Property Tax Law, which requires that real property be assessed at full value, has a lineage that dates back to 1788 (see *Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1, 3-4). The State Constitutional prohibition of assessments in excess of full value (NY Const, art XVI, § 2) was not adopted until 1938.

[2] The SBEA did not become a permanent body within the Executive Department until 1960 (L. 1960, ch 335).

been afforded an administrative hearing on the issues of the full and equalized value of their property since 1911, were entitled to raise the issue of inequality upon judicial review (see, e.g., *Matter of Staten Is. Edison Corp. v Moore*, 6 AD2d 369, 376-377). It is important to note, however, that the amendments made in 1953 to the section dealing with a special franchise owner's administrative hearing contained some significant changes in language. Instead of being furnished with a hearing after receiving notice of the "full and actual valuation of a special franchise and the rate of equalization thereof", special franchise owners were given a hearing only after receiving notice of their property's "valuation" (L 1953, ch 874, § 4).

Since a special franchise assessment is computed by applying some equalization rate to the value of the property, it is argued that the purpose behind giving special franchise owners notice only of their property's "valuation" was to prohibit them from challenging the equalization rate used. We need not, however, decide whether this omission of prior language evidenced a new legislative intent to restrict those issues upon which owners of special franchises could obtain administrative review, for in 1958 the Legislature adopted further amendments which mandated the SBEA to afford special franchise owners a hearing on the "tentative assessment" of their property (L 1958, ch 959). This language can today be found in section 608 of the Real Property Tax Law. Since the tentative assessment is determined by applying the latest State equalization rate to the full valuation of the special franchise, it seems clear that any review of the assessment must a fortiori bring up for review the two component parts necessary for its calculation (i.e., the property's full value and the equalization rate applied).

Having decided that the equalization aspect of a special franchise assessment is properly the subject of a hearing before the SBEA under section 608 of the Real Property Tax Law, we now turn our attention to the scope of judicial review provided. Article 7 of the Real Property Tax Law comprises the exclusive avenue for judicial review of real property tax assessments (see *Matter of Dudley v Kerwick*, 72 AD2d 224). The article itself is comprised of three separate titles. The first (§§ 700-726) is entitled

"General Provisions" and sets forth the procedures to be followed in seeking review of an assessment. Title 2 (§§ 740-744) is called "Special Provisions Relating to Special Franchise Assessments", while title 3 (§ 760) contains a miscellaneous provision allowing municipalities to challenge the State equalization rates established by the SBEA.

Section 706 states that illegality, overvaluation and inequality are the permissible grounds upon which a proceeding may be brought, while subdivision 3 of section 720 limits the type of evidence which may be received on the issue of inequality. Petitioner's argument, simply stated, is that these provisions of title 1 apply with equal force and effect to proceedings to review special franchise assessments since they do not conflict with any express provision within title 2 and thus comply with the command of subdivision 1 of section 740 that special franchise assessments be reviewed in the same manner as ordinary real property assessments "so far as practicable". The respondent argues that the previously mentioned sections of title 1 are pre-empted by title 2 and thus inapplicable to special franchise assessment review. Since the SBEA has been statutorily directed to apply the "latest state equalization rate" in computing special franchise assessments (Real Property Tax Law, § 606, subd 1), a situation unlike that found in assessing ordinary real property, respondent contends that petitioner is limited in an article 7 proceeding to challenging whether the latest State equalization rate was in fact used and may not attempt to show that use of said rate produced an unequal assessment.

We cannot agree with the arguments advanced by respondent, and accepted by Special Term, that it was the Legislature's intent to foreclose special franchise owners from attempting to prove the inequality of their assessments. Such a result, in addition to being inconsistent with past judicial efforts to preserve review by the courts of administrative determinations despite unambiguous statutory language to the contrary (*Matter of Board of Educ. v Allen*, 6 NY2d 127, 136), violates the spirit of subdivision 2 of section 616 of the Real Property Tax Law which purports to treat special franchise assessments "as if such assessment had been originally made by such [local] assessors."

Moreover, respondent's position is premised upon the notion that the State equalization rates developed each year by the SBEA are of such accuracy that judicial review of them is unwarranted. Such is not the case. It was not until 1961 that the applicable State equalization rate was even allowed to be put into evidence on the issue of inequality in an assessment review proceeding (Real Property Tax Law, § 720, subd 3, as amd by L 1961, ch 942, § 1). In an inequality trial, the search is to determine at what percentage of full value the local assessors have been assessing the taxable real property within a given taxing unit. Theoretically, that percentage should equal the State equalization rate computed pursuant to subdivision 1 of section 1202 of the Real Property Tax Law. Yet, the Legislature, in permitting the State equalization rate to be introduced as evidence of the percentage that assessed valuation bears to full valuation, did not make the State rate conclusive of that fact. Instead, it became one of three methods for proving that percentage.[3] Finally, by recent amendment made after the order of Special Term in this case was entered, the Legislature deleted that portion of section 720 which allowed introduction into evidence of the State equalization rate (L 1979, ch 126, § 2). The legislative findings which accompanied this legislation acknowledged that use of the State equalization rate in inequality proceedings had often led to undesirable and unintended results, and proclaimed that: "The legislature further finds that the reason such equalization rate is inappropriate and invalid is that the equalization rate established for the roll was never intended to determine property values for taxing purposes, but was intended only to be used in connection with equalizing state aid and to compute constitutional tax and debt limits. Therefore, the use of such equalization rate for the purpose of quantifying the ratio of assessment to market value within a taxing district produces spurious and counter-productive results." (L 1979, ch 126, § 1.)

---

[3] The other methods involve (1) sample parcels and (2) actual sales within the assessing unit during the year in which the assessment under review was made (Real Property Tax Law, § 720, subd 3).

In the face of this most recent pronouncement of legislative dissatisfaction with the applicability of State equalization rates to the issue of assessment inequality, it is difficult for us to believe that the Legislature desired to remove that issue from judicial scrutiny due to their faith in the accuracy of the State rates.

Rather, it seems much more logical for us to assume that the Legislature was cognizant of the inherent problems created by a system in which the SBEA assesses special franchises without knowledge of the local assessing practices, and directed use of the "latest state equalization rate" as a starting point for removing inequality between individual assessments. It was obvious that different taxing units did not assess property at the same percentage of full value. Some equalization rate had to be applied to remove inequality. Since the body empowered to determine special franchise assessments (the SBEA) was also developing the State equalization rates, it was only natural that these rates be used. However reasonable that conclusion may be, it does not compel the inference that by directing the SBEA to use the latest State equalization rates in assessing special franchises, the Legislature intended to treat the owners thereof differently from other real property owners seeking to challenge the inequality of their particular assessments. Thus, we conclude that the provisions of subdivision 3 of section 720 of the Real Property Tax Law relative to the trial on the issue of inequality apply with equal force and effect to review of a real property assessment and a special franchise assessment (see Lee and Le Forestier, Review and Reduction of Real Property Assessments in New York [2d ed], § 8.22).

Our holding in this case will insure that special franchise owners have a meaningful opportunity to challenge the State equalization rates used in computing their assessments. Only municipalities are given notice of the SBEA's tentative State equalization rates and afforded a hearing thereon (Real Property Tax Law, §§ 1204-1208). Indeed, the fact that section 760 of the Real Property Tax Law allows municipalities article 78 review of the final State equalization rates dispels any notion that these rates should be beyond judicial examination.

One final point should be addressed. In holding that special franchise owners not be permitted to challenge their assessments on the basis of inequality, Special Term expressed the fear that a conflicting morass of judically determined rates might develop if challenges were allowed on that basis. Such a fear appears unfounded. Special franchise owners seeking judicial review of their assessments must petition for review within 60 days after being served with a final assessment notice (Real Property Tax Law, § 740, subd 1) and all proceedings timely commenced may be consolidated (Real Property Tax Law, § 710). Indeed, the present consolidated proceeding is the best evidence of the salutary effect of section 710.

Accordingly, the order of Special Term granting the motions for partial summary judgment should be reversed, on the law, and the motion denied, with costs.

GREENBLOTT, J. (dissenting). I dissent and vote to affirm for the reasons stated by Mr. Justice KOREMAN at Special Term.

SWEENEY, STALEY, JR., and MIKOLL, JJ., concur with MAHONEY, P.J.; GREENBLOTT, J., dissents and votes to affirm in a spearate opinion.

Order reversed, on the law, and motion denied, with costs.

# OPINION OF THE SUPREME COURT, ALBANY COUNTY
(98 Misc. 2d 491)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Petitioner, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Respondent; CITY OF NEW YORK et al., Intervenors-Respondents.

Supreme Court, Special Term, Albany County, February 28, 1979

## APPEARANCES OF COUNSEL

*Robert Abrams, Attorney-General (Carl Rosenbloom* of counsel), for respondent. *Allen G. Schwartz, Corporation Counsel (John P. MacArthur* and *Rosario Renda* of counsel), for City of New York, intervenor-respondent. *Paul B. Bergins, Corporation Counsel (Morton H. Zucker* of counsel), for City of White Plains, intervenor-respondent. *McCarthy, Fingar, Donovan & Glathaar (Henry J. Smith* of counsel), for City of Mount Vernon, intervenor-respondent. *Whiteman, Osterman & Hanna, (Melvin H. Osterman, Jr.*, and *Norman Crotty* of counsel), for various municipalities within Westchester County, intervenors-respondents. *Marvin S. Fink* for Village of Scarsdale, intervenor-respondent. *Williams & O'Neill (Martin B. Cowan* and *Wien, Lane & Malkin* of counsel), for petitioner.

## OPINION OF THE COURT

HAROLD E. KOREMAN, J.

In these proceedings brought pursuant to article 7 of the Real Property Tax Law to review certain special franchise assessments, the respondent State Board of Equalization and Assessment (hereinafter State Board) and various intervenors-respondents move for an order granting partial summary judgment dismissing the portions of those petitions which seek to establish that the assessments were erroneous by reason of inequality in that the State Board arrived at and applied incorrect equalization rates in determining the special franchise assessments in question and which seek to establish what the equalization rates should be by

substituting equalization rates derived from current sales in each of the taxing units in place of the equalization rates as found by the State Board.

Approximately 168 proceedings involving some 44 taxing units have been commenced to review assessments for the tax years 1974-1975 through 1977-1978 of special franchises owned by petitioner located within the five counties of New York City and in various municipalities in Westchester and Rockland Counties.

The respondent State Board is vested with exclusive authority to determine the assessed valuation of all special franchise property located in this State (Real Property Tax Law, § 600).* The intervenors-respondents are the various municipalities and taxing units in which the special franchise properties are located.

The movants take the position that the issue raised by this motion is purely one of law, namely, whether inequality may be proved in these proceedings which were commenced pursuant to section 740 to review special franchise assessments, by resorting to evidence reserved for traditional inequality proceedings brought by an owner of ordinary real property pursuant to section 720; and further that the petitioner may not seek to disprove the actual equalization rate utilized by the State Board, nor may it prove what the equalization rate should be. The respondent State Board and the City of New York also argue that the inequality issue in these proceedings pursuant to section 740 relates solely to whether the appropriate equalization rate (not its correctness) was used by the State Board as mandated by section 606, and that consequently, the only issue that could arise in that regard is what rate the State Board was required to use and what rate it did in fact use in making the special franchise assessments under review.

While the petitioner argues that the motions for partial summary judgment are premature since it maintains they are directed

---

* All statutory references hereinafter made, unless otherwise specified, are to the Real Property Tax Law.

to the relevance of facts to be tendered as evidence on the trials, it nevertheless urges that the issues raised by the motions should be decided on the merits. All of the parties recognize that a resolution of the issues presented by these motions would be in the interest of judicial economy.

The substantial question presented for the court's determination is whether or not petitioner may, in a proceeding to review a special franchise assessment, challenge the methodology employed by the State Board in arriving at the equalization rates for the various taxing units involved in these proceedings.

Initially, petitioner contends that the identical issue raised on these motions has already been resolved by the decision on a prior motion in these same proceedings (*Matter of Consolidated Edison Co. of N.Y. v State Bd. of Equalization & Assessment*, 60 AD2d 356). The court does not agree. The Appellate Division, Third Department, held that the petitions herein are sufficient insofar as they raise issues of inequality; it reversed the dismissal by Special Term of those portions of the petitions as related to those issues and reinstated the allegations. In so doing that court stated (p 360): "It should be noted that such a reversal and reinstatement of the allegations relating to inequality *does not mean that this court is finding* that such issues have any merit or *that the underlying facts (an improper equalization rate) stated by way of allegation would be grounds for attacking an assessment.*" (Citation omitted; emphasis mine.) The question before the Appellate Division, which it answered in the affirmative, was whether or not the petitioner sought relief on the basis of inequality in its complaint before the State Board (Real Property Tax Law, § 610, subd 1) prior to commencing these proceedings, since, as the court stated, objections not raised at the administrative level may not generally be raised for the first time in the application for judicial review. Thus, in my view, the court on the prior motion decided simply that the issue of inequality had been properly raised in the proceedings, and stated in clear and unmistakable language that it was not passing upon the issue that is now raised by the instant motions. The fact that the petitioner had indicated in its brief and argument before the

Appellate Division what the nature of his proof would be in order to establish inequality cannot serve to enlarge or broaden the holding of that court.

Turning to the merits of these motions, it is noted at the outset that, "Article 7 of the Real Property Tax Law is the exclusive avenue for judicial review of all real property tax assessments 'unless otherwise provided by law' (Real Property Tax Law, § 700)", including, of course, special franchise assessments (*City of Mount Vernon v State Bd. of Equalization & Assessment*, 44 NY2d 960, 962). The Legislature has made it clear, however, that different standards apply for review of special franchise assessments (§ 740) than for review of assessments of ordinary real property in the traditional sense (§ 720). With respect to the latter, the local assessors are required to assess all real property in the assessing unit at full value (§ 306). Special franchise assessments, on the other hand, are made by the State Board which must first determine the full value of the special franchise property, and then apply the latest State equalization rate to it in computing the amount of the assessment, "Not withstanding the provisions of section three hundred six" (§ 606, subd 1). This statute makes clear that the "*latest*" State equalization rate *must* be applied by the State Board except in a case where any portion of the special franchise property was on the assessment rolls for the year 1953, in which case the State equalization rate for the year 1953 must be applied. For purposes of assessment and taxation a special franchise includes the value of the tangible property located in the public areas used by the owner of the franchise in exercising its right under the authority of its special franchise. In other words, the right or privilege to use the public streets or highways, as well as the physical installations made for the purpose of such authorized use, are assessed as real property for the purpose of taxation (§ 102, subd 12, par [h]; § 102, subd 17). The Legislature has specifically provided for judicial review of special franchise assessments by enacting section 740 which applies *only* to proceedings to review those assessments. In so providing, the statute states that a special franchise assessment may be reviewed in the manner prescribed for reviewing an assessment of real property, but only "so far as practicable". Clearly,

therefore, the Legislature recognized that the basic differences between an assessment by a local assessor of ordinary real property and a mandated special franchise assessment by the State Board would require that different standards be applied in reviewing special franchise assessments. It is noted in this regard that commencing with section 700 and continuing through section 726, the Real Property Tax Law deals with "[p]roceeding to review an assessment of real property", while sections 740 through 744 deal with judicial review of special franchise assessments and are entitled "Special Provisions Relating to Special Franchise Assessments".

The entire legislative history relating to assessments and taxation of ordinary real property in general and special franchise in particular reveals that the legislature intended to create a separate and distinct system or process, not only for the purpose of establishing equalized valuations for special franchise properties but also a different method of judicial review for such properties. Special franchises were a new kind of property and the problem was to place a just and adequate valuation upon it for the purposes of taxation. This new kind of property was termed real property by the Legislature, "Just as it might have been termed personal property, or neutral property, without changing its nature, which was such as local assessors had never dealt with * * * [p]roperty unknown as the subject of taxation to the framers of any of our Constitutions was brought into the system, which required new methods of valuation and the exercise of functions which had never belonged to local assessors. The property was *sui generis*, and from its nature could not be valued by local officers." (*People ex rel. Metropolitan St. Ry. Co. v State Bd. of Tax Comrs.*, 174 NY 417, 438-439). Consequently, the authority to assess special franchise properties was vested in the State Board of Tax Commissioners as far back as 1899 (L 1899, ch 712). Any question of equalization of special franchise assessments could be raised only in a certiorari proceeding. Over a period of years dating back to 1911 the Legislature developed a process of administrative equalization solely for the purposes of special franchise assessments. In so doing, it removed the review of special franchise assessments from then section 293 of the Tax Law to a new section 293-a (L 1916, ch 323), the former governing review

of ordinary assessments and the latter special franchise assessments. Most significantly, in 1953 the Legislature enacted a new section 45 and amended section 45-a of the Tax Law (L 1953, ch 874). Section 45, now section 606 of the Real Property Tax Law, directed the State Board to apply the 1953 State Equalization rate to that portion of the special franchise which was assessed in 1953 and to apply the latest State equalization rate to all other special franchise property. In amending section 45-a of the Tax Law, the subject matter of which is now found in sections 608, 610 and 612 of the Real Property Tax Law, the Legislature deleted all references to the rate of equalization, including notice of and hearings previously required on any complaint concerning the rate of equalization. The deletion or omission of this matter evidences, in my view, a recognition on the part of the Legislature that the correctness of the rate utilized by the State Board in arriving at the assessed valuation of special franchise properties should not be subject to challenge by the owner of such special franchise.

Article 12 of the Real Property Tax Law, which provides for the establishment of the equalization rate by the State Board, requires that notice be given to a taxing unit of the determination of a tentative equalization rate, and the taxing unit is afforded an opportunity to file a complaint objecting to the tentative equalization rate. The taxing unit is then entitled to an administrative hearing on its objections before a final equalization rate is established for that particular municipality. The only recourse thereafter available to the taxing unit is by way of a proceeding brought pursuant to CPLR article 78 in which judicial review of the State Board's final determination of the equalization rate may be had (§ 760). A municipality may not otherwise seek judicial review of a special franchise *assessment* as fixed by the State Board (*City of Mount Vernon v State Bd. of Equalization & Assessment*, 44 NY2d 960, *supra*). The owner of special franchise property may file a complaint and is entitled to a hearing thereon before the State Board, but only with respect to the tentative *assessment* of his special franchise (§§ 608, 610, 612). He may also seek judicial review of the final *assessment* as fixed by the State Board (§ 740). In such a proceeding

for judicial review, however, neither article 7 nor any other provision of law accords the owner of a special franchise any right or authority to attempt to establish a different equalization rate than that arrived at by the State Board.

In contending as a basis of its claim of inequality that its special franchises were assessed at a higher proportionate valuation than the assessments of all other real property in the taxing unit, petitioner seeks by these proceedings to establish an equalization rate derived from all of the current arm's length sales in the taxing unit. Petitioner's reliance on *Matter of Standard Brands v Walsh* (92 Misc 2d 903, affd 60 AD2d 605, mot for lv to app den 43 NY2d 649) in support of this position is misplaced. In *Standard Brands* the court had under review the traditional assessment of ordinary real property in a proceeding brought pursuant to section 720. In such proceedings the State equalization rate is but one of the alternate evidentiary devices that may be utilized by a property owner on the question of inequality, as provided in subdivision 3 of section 720. When the equalization rate is used for that purpose it is also subject to impeachment (*Guth Realty v Gingold*, 34 NY2d 440). Such is not the case with respect to special franchise assessments where the equalization rate is not an evidentiary matter, but the standard which must be utilized by the State Board which has no authority to arrive at the assessment by any other means (§ 606). The court is not persuaded that a challenge to the State equalization rate is permissible under the authority of *Matter of Staten Is. Edison Corp. v Moore* (6 Misc 2d 1031, revd 6 AD2d 369, retried 37 Misc 2d 198, affd 15 AD2d 983, affd 12 NY2d 846), as urged by petitioner. The assessment before the court in *Matter of Staten Is. Edison Corp.* and the proceeding to review it were made and commenced pursuant to the provisions of the Tax Law in effect prior to 1953 when the State equalization rates were not based on scientific studies and were considerably out of date, and at a time when special franchise owners still had the right to object to a proposed equalization rate as well as the right to be heard on their objections. We are dealing here with a State equalization rate which is "objectively arrived at" and which "today is expertly arrived at" (*Guth Realty v Gingold*, 34 NY2d 440, 450, *supra*; see, also,

*860 Executive Towers v Board of Assessors of County of Nassau*, 53 AD2d 463, 472), and its use is now mandated in determining special franchise assessments. In the *Matter of Town of Huntington v State Bd. of Equalization & Assessment* (53 AD2d 6), the State equalization rate was not only challenged successfully but changed by the court. However, the proceeding before the court there was brought by the taxing unit pursuant to CPLR article 78 as prescribed by section 760, and was not a proceeding to review an assessment of real property. Furthermore, as the court at Special Term pointed out in *Matter of Town of Huntington*, "in this proceeding petitioner does not contest the State Board's sampling methodology nor its valuation formulae" in arriving at the rate (81 Misc 2d 457, 461). In *Bloom v Mayor of City of N.Y.* 35 AD2d 92, affd 28 NY2d 952), also cited by petitioner, it was held that a taxpayer could challenge an equalization rate computed pursuant to article 12-A of the Real Property Tax Law. Since the court in that case was considering special equalization ratios for computing constitutional tax and debt limitations, it can have no application to the equalization rate established under article 12 with which we are concerned here.

The court has examined petitioner's argument that an interpretation of section 606 in the manner urged by the movants would be constitutionally impermissible as a denial of equal protection of the laws. In my opinion this constitutional issue as advanced by the petitioner is insubstantial and does not require extended discussion (see *Kentucky R.R. Tax Cases*, 115 US 321; *Rapid Tr. Corp. v New York*, 303 US 573; *Southern Ry. Co. v Watts*, 260 US 519).

The court concludes as a matter of law that, in determining the assessments of petitioner's special franchise properties the respondent State Board could not apply any equalization rate but the rate established by it pursuant to article 12, and, further, that in seeking judicial review of such assessments, the method by which the State Board arrived at that equalization rate may not be called into question. To hold otherwise would result only in creating a chaotic situation with respect to the manner in which the rate should have been arrived at in a particular special franchise assessment under review. Instead of the same

rate being applied in a given tax year, several different rates would be used as a result of different judicial opinions. It is clear that the Legislature could not have intended such a result, especially when we consider that it has established standards which it requires the State Board to use in arriving at equalized valuations or assessments of special franchises.

While the conclusion reached by this court leaves the equalization rate established by the State Board effectively immune to attack by the owner of a special franchise for incorrectness or inaccuracy, however great, the potential for abuse is no greater than that which resulted from a similar conclusion arrived at in *City of Mount Vernon v State Bd. of Equalization & Assessment* (44 NY2d 960, *supra*). It was there held that the State Board's assessment of a special franchise is immune to attack by a municipality. It was also held (p 963), and this court so holds, that if, in justice, there is a need to eliminate this potential for abuse, the remedy is with the Legislature.

Accordingly, the motions for partial summary judgment are granted.

---

# OPINION OF THE SUPREME COURT, WESTCHESTER COUNTY IN MATTER OF TECHNICON INSTRUMENTS

In the Matter of the Application of
TECHNICON INSTRUMENTS CORP.,

*Petitioner,*

— against —

THE ASSESSOR OF THE TOWN OF GREENBURGH, THE BOARD OF REVIEW OF THE TOWN OF GREENBURGH and THE TOWN OF GREENBURGH,

*Respondents.*

CENTRAL SCHOOL DISTRICT OF THE TARRYTOWNS,

*Defendant-Intervenor.*

Index Nos. 19278/79, 20303/80, 20429/81, 21276/82, 20099/83

## OPINION

MARBACH, J.

The proceedings were brought by petitioner to review tax assessments on its real property in the Town of Greenburgh for the years 1979, 1980, 1981 and 1982 on the grounds of overvaluation, inequality and illegality. After the trial, the plaintiff withdrew the illegality ground which sought to invalidate the entire tax roll of the Town. The parties agreed that the trial should first proceed to determine the true ratio between assessment and market value and then to the issue of valuation but that the determination by the Court on ratio should not be made before the hearing on valuation.

The property of petitioner is located on the north side of Benedict Avenue consisting of approximately 36 acres and improved with a building used for offices, research, warehouse and assembly together with parking area, driveways, landscaping and

ponds. The product of the petitioner is particularly a line of highly technical machines which do processing of blood by rapid calculation of a number of contemporaneous steps. The property is a short distance from Route 119 on which there has been built in recent years a Marriott Hotel and a number of office buildings.

*Proof as to Ratio and the Issues Thereunder.*

Before the start of the trial the petitioner made an application to Mr. Justice Timothy J. Sullivan for permission to put in evidence a ratio study based upon all of the sales in the community in the years in question without the necessity of subpoenaing, and putting on the stand parties to the various transactions. Mr. Justice Sullivan rendered an opinion granting the application while permitting each of the parties to subpoena witnesses if it was determined necessary. A notice to admit ratio was served and was denied. The ratio set forth in the study made by Mr. Eugene Albert, petitioner's expert, differed from that in the notice but petitioner, at the trial, has offered the Albert study which indicates the following ratios:

| 1979 | 1980 | 1981 | 1982 |
|---|---|---|---|
| 23.45% | 20.54% | 16.95% | 15.65% |

At the trial the petitioner relied upon the Albert studies and a statistical report which somewhat refined the Albert study. Petitioner further analyzed the State equalization rate and anticipatorily rebutted the reliability of that rate by use of the State's own report (Exhibit 4 which will be discussed later). The respondent relied primarily upon the methodology of the State Equalization Board's appraisals and reports establishing ratios for the particular years. The State equalization rate for the four years are as follows:

| 1979 | 1980 | 1981 | 1982 |
|---|---|---|---|
| 30.32% | 29.02% | 27.74% | 27.84% |

While it has been said upon this record that this is a case of first impression, this Court does not see it as such. The methods employed by each side have been analyzed before by able Judges

and it is true only that if either of the alternative methods of proof is fully tried, the result is unique only for the particular community involved. Section 720 of the State Real Property Tax Law provides in subdivision 3 thereof for three means of proving inequality: The use of select parcels; actual sales within the existing unit during the year in which the assessment under review was made; and the State equalization rate established for the roll containing the assessment under review. An analysis of the latter method is contained in the brilliant opinion of Mr. Justice Morrie Slifkin in *Standard Brands v. Walsh*, 92 Misc. 2d 902 affirmed at 60 AD 2d 605, leave to appeal denied at 43 NY 2d 649. That case is referred to by a number of Judges as upholding the proper theory that the weight to be given to the various methods is a question for the trial Court. The Courts have generally rejected the selected parcels method since the parties on each side choose from the opposite ends of the spectrum.

In this case the petitioner had Mr. Eguene Albert's office "take off" all the sales in the Town in the area in question. The total numbers of sales were 2,012 in the year 1979; 1,868 in the year 1980; 1,443 in the year 1981 and 1,344 in the year 1982. All office staff reviewed those which were interfamily or obviously not normal transactions and then Mr. Albert himself rechecked or reverified. The percentage of actual verifications in the Albert study range from 64.05% to 81.04% and the Court finds that Annette Birnbaum of the Albert Appraisal Company was in fact qualified by training and personal work in previous ratio studies to do preliminary verifications in order to strengthen information which was available on the records in the County Clerk's office. Mr. Albert himself randomly selected 100 sales and was able to personally verify 64 speaking directly to a party to the transaction. While this Court will reject some refinement of the Albert figures made by Dr. Edelstein, that witness was qualified to give an opinion as to the ratio study. He has taught at the Wharton School on this subject and has published and has otherwise been qualified in the areas of statistics and economics. His opinion was that the Albert study yielded credible ratios even when tested by the State Equalization Board on sales data.

As a result of the determinations by review or inability to verify, a number of sales were rejected so as to leave in various years the following sales:

| 1979 | 1980 | 1981 | 1982 |
|---|---|---|---|
| 1285 | 1133 | 856 | 643 |

The attack upon the sales method was aimed primarily at the so-called "sales bias" which respondents' witness claims results from the failure to stratify the entire "universe" of the tax roll, meaning that the sales, in a particular year may be highly weighted towards residential and not reflective of the various classes of buildings and properties on the entire roll.

The State's employment of the appraisal method is designed for a purpose different from tax certiorari, namely to equalize ratios between communities as a basis for the receipt of State aid or the equalization of their tax burdens within the various counties. It appears to this Court that the individual tax payer is entitled to have the true market value proven by actual sales prices as a basis for his fair share of taxes within the community itself.

We have previously referred to the opinion of Mr. Justice Slifkin in *Standard Brands v. Walsh, supra.* That Justice reviewed the failure to utilize classification as the State does by pointing out that it is illegal to assess at different rates for different classes and indeed here the assessor has insisted that he does not use a different rate for any class. Mr. Justice Slifkin found the use of all of arms-length sales to be a better means of testing ratio even assuming the objectivity of the State Board of Equalization and Assessments procedures. Justice Slifkin was undoubtedly heavily affected by the fact that the subject premises before him was a large proportion of the assessment roll. But that fact does not destroy his reasoning nor his approval of the sales method of the determination of ratio.

The problem with the State's ratio figures are time lags and the unknown appraisers whose appraisals may vary. The State appraises randomly selected properties and matches them with

their actual assessment for a particular survey year. The appraisal is made and the result of the study released as the equalization rate for a particular year and that rate is determined either by a particular prior year or a proportion of contribution between a new survey year and data from a prior year. The rate, therefore, may be four or five years old compared to actual market value or even older because the figures attributed to a particular appraisal may predate even the so-called survey time. For instance, the State Equalization rate for the Town of Greenburgh for the assessment year of 1979 used so-called market values in the year 1976 and for the assessment year 1980 used one-half of market value for 1976 and one-half for 1978, and in 1981 and 1982 used "market values" for the year 1978.

Dr. Chottiner of the State Board testified that its methodology is sound but conceded the time lag and stated that there was no such time lag problem in use in the *Albert* study. When Dr. Chottiner was employed by the County of Westchester in 1973, he recognized the time lag problem and worked to incorporate the use of more market data for Westchester equalization rates.

In the case of *Great Atlantic and Pacific Tea Company v. Kiernan, Town of Horse Heads, et al*, County of Chemung, Index Number 46461/1974, Mr. Justice Frederick B. Bryant, on March 10, 1980, filed an opinion in Ithaca that thoroughly analyzed a similar problem before him. There the respondent Town had asserted that the equalization rate established by SBEA properly reflected the ratio of market value to assessment. The Justice recited the alternative methods, the general rejection of the selected parcels method and the history of both the rejections and acceptances of the State equalization rate. The Court said that other Courts have frequently expressed approval of actual sales method and that the problem of such proof was only one of cost. Mr. Justice Bryant accepted the forms filed with the assessor without any proof of verification. In the end, the Court found that on the proof before him, petitioner had sustained the burden of proof based on the number of parcels in his calculation and closeness in time to the tax years. He made his findings upon the proof before him in the particular case.

Finally, Mr. Justice Kuhnen at Binghamton, in the case of *RAB Co. Riviera Ridge Apartments v. McNeal, Assessor for the Town of Vestal*, had before him market sales study in which the witness had been able to verify 241 of 401 transactions by contacting a party involved or broker or attorney. The Court considered as appropriate the proof of sales that occurred during the year of the assessment under review and rejected the same arguments made here that the sales would not represent a valid picture of the whole assessment roll nor a random selection of each class of types of property. Mr. Justice Kuhnen agreed with Mr. Justice Slifkin that it was appropriate to consider that the sales were closer in time to the year in question than those used by the State Board and that the sales method was in fact representative of all the classes of properties which were sold. He further points out that the use of all sales includes some which might adversely affect a petitioner's position.

Because this opinion is not officially reported and because of my concurrence in the reasoning of Mr. Justice Kuhnen, I annex it hereto and incorporate it herein.

The respondents cite a recent opinion by Mr. Justice Lawton in Syracuse, *ACO Realty Corporation v. Robert Srogi* which rejected an attempt to extract certain sales and give to them a weighted ratio. The Court said:

> ". . . No court to date has sanctioned the weighted approach. Further, by using the weighted method, the respondent attempts to combine the statistical approach of the State Board with the non-statistical all sales method. In determining a ratio based on an "all sales method," all sales should be aggregated to determine the ratio rather than attempting to categorize the sales into an inapposite statistical methodology. The State Board's use of categories and value intervals is based on random samples, not non-random sales. Additionally, the testimony adduced at trial showed that respondent's attempt to duplicate SBEA's categorization and interval valuation could not be accomplished, but rather intervals had to be collapsed, combined or sometimes not used at all because there were no

> sales available within that category or value interval. What statistical effect resulted from this tinkering with this methodology clearly is a matter of conjecture and speculation again pointing out the weaknesses of this hybrid approach. Section 720 of the RPTL provides for an "all sales approach method," and not a combination of all sales-random statistical method as attempted by the respondent's experts. Therefore, the weighted ratios presented by the respondent are rejected, and the unweighted ratios are accepted as the City's proof of the correct equalization rate for the years at issue."

This Court concurs with the reasoning of Mr. Justice Lawton here and will not apply the Edelstein report to reduce further the ratio from that found by Albert.

I therefore adopt the findings of the Albert report and find that the true ratio of value to assessment in the pertinent years is as follows:

| 1979 | 1980 | 1981 | 1982 |
|---|---|---|---|
| 23.45% | 20.53% | 16.95% | 15.65% |

An attack was made upon the accuracy of the verification of the transactions used for the purpose of the ratio study by showing that in some cases there was an additional mortgage or that there was a lease covering the premises which affected the real value. While the Court was quite willing to accept the general verification methods, I was not willing to lead a full scale battle between the results of those methods and the equally hearsay testimony of the real estate expert for the Town. I would take into consideration the fact that some discrepancies were shown to exist on the basis of the documents themselves covering the real estate transactions. However, in the light of the large numbers of transactions, the errors were in only a small fraction. Even the demonstrated errors did not substantially affect the ratio since an omission of a portion of the consideration will in the end lower the ratio so that the omissions were to the benefit of the Town and not in reverse.

While the respondent Town constantly complained of the hearsay nature of the sales ratio approach the basic reliance was on the documentary evidence reviewed in the office of the County Clerk. There hearsay verification was equally used by the appraiser for the Town in confirming terms of sales or rentals on the evaluation portion of the case.

The Court is not able, in the confines of a relatively short opinion, to review all of the problems in the State's procedures. Their own reports and their own analyses admit the time lag problem as being substantial and Dr. Edelstein's analysis for the petitioners amply demonstrates the great statistical strength of the sales approach.

*Valuation*

Technicon property consists of 36.11 acres on the northern side of Benedict Avenue in the Tarrytown section of Greenburgh. This street is distinguished, because of its narrow width and limited turning areas, from nearby Route 119 which is a main commercial corridor nearby. The property abuts a substantial residential development and was built upon an estate whose residence still exists and is shown by both parties in the appraisals. Improvement consists of a main building of 385,900 square feet and the former residence which is dettached and unused. The assessed valuation of the property was $3,754,250.00. Petitioners' summary of valuation conclusions is found on Page 4 of the Albert appraisal:

## SUMMARY OF VALUATION CONCLUSIONS

| MARKET VALUES | 1979 | 1980 | 1981 | 1982 |
|---|---|---|---|---|
| Land | $2,700,000 | $2,916,000 | $ 3,132,000 | $ 3,348,000 |
| Improvements | 6,500,000 | 6,984,000 | 7,568,000 | 8,152,000 |
| Total | $9,200,000 | $9,900,000 | $10,700,000 | $11,500,000 |
| **Actual Assessment** | | | | |
| Land | $ 484,250 | $ 484,250 | $ 484,250 | $ 484,250 |
| Improvements | 3,270,000 | 3,270,000 | 3,270,000 | 3,270,000 |
| Total | $3,754,250 | $3,754,250 | $3,754,250 | $3,754,250 |
| **Indicated Assessment** | | | | |
| Land | $ 633,150 | $ 600,988 | $ 530,874 | $ 523,962 |
| Improvements | 1,524,250 | 1,439,402 | 1,282,776 | 1,275,788 |
| Total | $2,157,400 | $2,040,390 | $1,813,650 | $1,799,750 |

The property has a beautiful exterior from the front approach including lawns and two landscaped ponds. The rear and side views showing the loading docks and other space in the West and North more clearly demonstrate the utilitarian character of the building. The main building is a laboratory-warehouse and research center with a few supplementary offices. It has an improved office for the President, the cafeteria is roomy and modern and there is an auditorium for lectures, but the rest of the space is utilitarian. This Court visited the property and walked through every portion of it. The petitioners' appraiser contrasts this mixed use to the pure office buildings in the "platinum corridor" running from Tarrytown to Rye. The appraisal itself has photographs of the President's office and the Law Department offices which are the only decent offices in the entire building. There is a photograph on Page 32 which shows some lesser office cubbyholes for persons who work in the laboratories where a person can sit at a desk and dictate results or work with a computer. The warehouse and assembly area as shown on Pages 34 and 35 of petitioners' appraisal reflects the great bulk of the building which is devoted to the production or the assembly of technical machines and to research in their improvement. Thirty-five percent and more of the office space is devoted to laboratory use and thirty-three plus percentage to warehouse or manufacturing. Less than four percent is for office of good quality and eighteen percent for office of fair to poor quality.

A great deal of the building is not air conditioned. There is within the building itself evidence of dampness and settlement cracks. Sections of roofing have been replaced and there will continue for some time to be repairs and replacements. In 1979 the building was twelve years old and is anticipated to have a remaining economic life of forty years from that time.

The building was in conformity with the zoning when erected but will not now comply with the requirements that such a use on a premise have access directly from a major road with State or County jurisdiction. There is no specific proof on the number of parking spaces but the Court's inspection shows a very large proportion of areas devoted to such off-street parking and it would appear that the land is sufficient to meet the parking requirements of the new ordinance.

The property is valued on a fee ownership basis. The petitioner is, however, a tenant who constructed the improvements at his own expense beginning in about 1967. The fee owner is Ben Hack Realty Associates (Berensen Partnership) and petitioner occupies it under a lease running to April 30, 2022 plus five successive renewal terms of ten years each.

The petitioner cites comparable land sales running from $53,800 per acre to $196,429 per acre. Sales of improved property were done on a regional basis having in mind the need to locate, if possible, single user buildings combining warehouse, manufacturing, research and office facilities. These are located in Yonkers; Mt. Pleasant; Yorktown; Rye; Tottowa, New Jersey (Passaic County); Cranbury, New Jersey; Babylon, Long Island; Huntington, Long Island; Comack, Long Island; and Ridgefield, New Jersey. The one most comparable is sale number eight formerly occupied by Western Electric Company for the manufacture of telephonic equipment.

Petitioner's appraiser comes to a valuation of the land as follows:

1979 - TWO MILLION, SEVEN HUNDRED THOUSAND ($2,700,000) DOLLARS or $75,000 per acre, rounded

1980 - TWO MILLION, NINE HUNDRED SIXTEEN THOUSAND ($2,916,000) DOLLARS or $81,000 per acre (1979 at 1.08%)

1981 - THREE MILLION, ONE HUNDRED THIRTY-TWO THOUSAND ($3,132,000) DOLLARS or $87,000 per acre (1979 at 1.16%)

1982 - THREE MILLION, THREE HUNDRED FORTY-EIGHT THOUSAND ($3,348,000) DOLLARS or $93,000 per acre (1979 at 1.24%)

For an income approach the petitioner's appraiser cites leases of offices and industrial buildings in Westchester County some of which are small; some are in excess of 100,000 square feet. These buildings have offices, warehouses and laboratory space. The economic rate applicable to the specific premises after adjustment is as follows:

1979 - FOUR DOLLARS SEVENTY-FIVE CENTS ($4.75) PER SQUARE FOOT

1980 - FIVE DOLLARS THIRTEEN CENTS ($5.13) PER SQUARE FOOT (1979 at 1.08%)

1981 - FIVE DOLLARS FIFTY-ONE CENTS ($5.51) PER SQUARE FOOT (1979 at 1.16%)

1982 - FIVE DOLLARS EIGHTY-NINE CENTS ($5.89) PER SQUARE FOOT (1979 at 1.24%)

For the purpose of capitalization, the appraiser used a basic interest rate in 1979 of 11.75% and equalization tax rate of 4.305%. He found a net operating income of $1,615,859.00. The income attributable to land value of $2,700,000 was $433,485. Income attributable to improvements was $1,182,374 which capitalized to an improvement value of $6,372,266. The total value was $9,070,000. The same approach brought improvement valuation for the years 1980, 1981 and 1982 at the figures of $6,876,909, $7,540,282 and $8,404,416.

The equalized tax rate computation appears at Page 52 of the Albert appraisal and, of course, was used instead of the actual taxes.

The appraisal submitted by Joseph M. Adrian for the respondents agrees that the subject premises is comprised of 36.11 acres, with a frontage of 688.49 feet on Benedict Avenue, and has substantial improvements in the form of the main building, driveways, parking areas, landscaping and retention ponds. The appraisal fairly reflects the distinction between Benedict Avneue and Route 119 recognizing the former as a primary neighborhood artery with two lanes. Photographs of Benedict Avenue are contained in the appraisal on Page 19. But recognizing, of course, its closeness to the area of 119 and the Cross Westchester Expressway, it has experienced substantial office development in recent years. Mr. Adrian gives the square footage as 389,000 square feet which is a few less than that used by the petitioners and ultimately does all calculations based on the lesser amount. The Court has resolved this doubt against the petitioner.

The appraisal describes the executive offices, open office areas and a number of partitioned offices, laboratory areas, storage and machine rooms and cafeteria, classrooms and warehouse areas and assigns 102,000 square feet to "offices and related space."

The former residence is in generally poor interior condition without any intrinsic economic value. The estimated demolition and removal costs are offset by salvage value of its various components and the appraiser would assign a value to the 2.8 acres underlying the former residence.

For the purpose of the appraisal, Mr. Adrian utilizes the New York State equalization rates of 32.27%, 30.32%, 29.02% and 27.74% and he also logically differs from Albert in thus determining the equalization tax rates which he fixes at 4.30%, 4.32%, 4.35% and 4.58%.

He cites a land sale in Harrison in 1975 at $117,859 for 28 acres. A second sale consisted of partially open land with some outcropping rock deposits (the site of the Stouffer Hotel) on the corner of Westchester Avenue and Kennilworth Road and was made up of two former estates. The first of 37.85 acres sold in 1974 for $5,451,000 and the other portion of 58.7 acres of generally open and rolling land sold in March, 1974 for $5,000,000. The assembled price for what was to be the Texaco Company's main office was $108,503 per acre adjusted on a time basis in 1979 to $139,967 per acre. Another sale, also cited by Albert in his appraisal, from the Westchester Newspapers on Gannett Drive and Westchester Avenue in Harrison of primarily interior parcels totaling 22.70 acres which was wooded and contained rock outcropping realized a price of $2,837,125, which the appraiser adjusts for site preparation to $182,250 per acre at the time of purchase in 1980.

Other sales nearby were of smaller parcels; one of 5.37 acres in 1981 for $260,708 and acre; another of 2.264 acres on Tarrytown Road, less than 1,000 feet from the subject premises, in 1982 for $419,611 per acre.

The property comprising sale number six is one which contained a very large amount of rock. It is two-fifths of a mile from the subject premises, on Taxter Road, and an office building has now been erected on the site. It comprised 17.21 acres and sold for $4,400,000 in 1982 or $255,665 per acre. This parcel was also used by Albert in his sale number seven which noted that in addition to the surface consideration the builder had to pay for the cost of improving Taxter Road, environmental impact reports, et cetera at a cost exceeding $500,000. Other sales cited by Adrian reach from adjusted values of $125,000 to $170,000 per acre. He rejects as a comparable a sale from the State of New York to Halpern because the extent of the site preparation costs of this swampy area were not known at the time of purchase and the surface price of $62,500 was later magnified by pilings and fill et cetera, costing approximately $5,000,000 for the 25 acres.

Improved sales included the building devoted to the offices of Connecticut General Life Insurance Company, Columbus Avenue in the Town of Mt. Pleasant, about four miles from the subject premises, made in 1975 for a total price of $7,425,000 or $52.71 per square feet adjusted by the appraiser to a 1979 figure of $59.03 per square foot and has an indicated value for the subject property of $35.42 per building square foot overall. Another sale cited is that of a two-story office building on Theodore Fremd Avenue, City of Rye, with eighty-six offices and six laboratories and some shipping and receiving areas which sold in 1980 for $2,500,000 or $42.37 per building square foot which the appraiser used to indicate a figure of $37.75 per building square foot overall. Other sales cited are the Nestle Company headquarters in White Plains in 1981 for $12,000,000 representing $77.44 per square foot to indicate a value here of $38.72 per square foot; Allstate Insurance Company offices, Red Oak Lane in Harrison in 1981 for $13,500,000 or $86.32 per square foot from which the appraiser estimated a value of $38.84 per building square foot overall. He cites also the Savin Corporation sale on Columbus Avenue in Valhalla, of its office building, which was sold in 1983 for $3,500,000 or $68.96 per square foot indicating a value of $40.17 per building square foot overall. Other sales will be discussed later herein.

The Adrian appraisal values the subject premises, on the basis of grid adjustment, at $121,000 per acre in the base year of 1979 and for the four years as follows:

1979 36.11 acres at $121,000 per acre

FOUR MILLION THREE HUNDRED THOUSAND ($4,300,000) DOLLARS

1980 36.11 acres at $128,000 per acre

FOUR MILLION SIX HUNDRED THOUSAND ($4,600,000) DOLLARS

1981 36.11 acres at $136,000 per acre

FOUR MILLION NINE HUNDRED THOUSAND ($4,900,000) DOLLARS

1982 36.11 acres at $144,000 per acre

FIVE MILLION TWO HUNDRED THOUSAND ($5,200,000) DOLLARS

The improved sales comparison, according to the witness, gave a value to the subject property as follows:

1979 389,000 building square feet at $34.75/square foot

THIRTEEN MILLION, FIVE HUNDRED THOUSAND ($13,500,000) DOLLARS

1980 389,000 building square feet at $36.00/square foot
FOURTEEN MILLION ($14,000,000) DOLLARS

1981 389,000 building square feet at $37.25 square foot

FOURTEEN MILLION, FIVE HUNDRED THOUSAND ($14,500,000) DOLLARS

1982 389,000 building square feet at $38.50/square foot

FIFTEEN MILLION ($15,000,000) DOLLARS

Economic rentals are analyzed by the appraisal citing properties for office rentals comparable to subject's lower level space and upper level office and laboratory and, separately, leases for warehouse and light industrial related space comparable to subject's 189,000 square feet of such space. This portion of the appraisal is rejected completely as an analysis based upon an error of law since the premises must be valued as they are used, as a whole, by the tenant in possession, and occupying the premises for its unified purposes. In *Loral Electronic Systems v. The Assessor of the City of Yonkers, et al*, Westchester County, May 9, 1983; Mr. Justice Sullivan cited a principle of law as follows: The Court said of those premises, "The subject property improvements were built for single tenant occupancy and that the property was always occupied as such . . . The Court in its personal inspection and tour of the property, observed and concludes that single tenant occupancy is the correct basis for appraising the property. Property must be assessed according to its condition on the taxable status date . . . The subject property must be valued as it exists, namely an industrial building with office space . . . He excluded as comparables properties primarily devoted to office use and particularly in the "platinum" mile, for even a partial test of true economic rates. The appraiser whose conclusions on that basis were rejected there is the same appraiser as here and is using the same rationale. The instant appraisal was primarily drafted in 1982 before the opinion by Justice Sullivan in 1983.

Since the income comparisons of respondent in 1979, 1980, 1981 and 1982 are translated upon such improper economic rental figures, they will be completely rejected.

The Court rejects, in any event, the alternative capitalization method used by both appraisers since it has accepted the regional study made by Albert for the petitioner to demonstrate available market data for a number of comparable properties and has thus opted for the market data approach. The grid adjustments made for those properties are not rebutted factually or by admission on cross-examination. In *A & P Tea Co. v. Kiernan*, 42 NY2d 326, the Court said at Pages 239-40:

> "Section 306 of the Real Property Tax Law requires that all property be assessed at its full value and generally, it is "market value" which provides the most reliable valuation for assessment purposes (see People ex rel Parklin *Operating Corp. v. Miller*, 287 NY 126, 129; Lee & Le Forestier, Review and Reducing of Real Property Assessments, § 1.03, p 3). However, where there is no reliable market data, other methods are available such as the capitalization of income method which is utilized in valuing rental property (see e.g., *Matter of City of New York* [Oceanview Terrace], 42 NY2d 948; *Matter of Pepsi-Cola Co. v. Tax Comm.*, 19 AD2d 56)."

In confirmation of the existence of such a regional market, Petitioner cites sale number fourteen in the Albert appraisal, a 1978 sale of an improved parcel in Middlesex County, New Jersey, from Cities Service Research and Development Company to General Foods Corporation for a research center. General Foods Corporation had, at the time, its main headquarters in White Plains and some other nearby buildings, including one in Tarrytown, just one mile from the subject property (The Adrian sale number two). This kind of change in location of a major corporate facility from the Westchester area to nearby New Jersey is wholly probative of the existence of a regional market.

We do not have here a building which is income producing since only the land was leased and the petitioner erected all of the structures at its own cost. Regardless of the source of validity of the leased property figures, it is unneccessary here to consider even the supportive capitalization of Albert based upon acceptable comparables. Albert's income approach, does appear, within itself, to be based upon acceptable rates but the market data approach is preferable. There is an effort on behalf of the respondent to assign some additional land value to the land west of one of the driveways containing the unused former mansion and constituting 2.8 acres. Adrian urges that this land is not necessary to support the existing utilized building areas. His argument is that this property should be excluded from the income approach but he nevertheless includes this acreage within the

overall 36.11 acres. I am unable from the appraisal and the record to follow the effects of his reasoning since the net result in any event is the parcel's inclusion in the land and his income approach has been rejected. The Court has inspected the property and sees no reasonable way for subdividing this so as to permit adequate access to Benedict Avenue. Most importantly, the zoning on the specific tract provides for a minimum parcel area of 35 contiguous acres. The community would obviously not permit a subdivision to reduce the remaining parcel to nonconforming status and no other appropriate legal development plan is demonstrated.

I am conscious of the basic principle that it is the whole property as improved and as used that is being valued, and that the land value is extracted from the whole. I have applied that principle consciously to the breakdown which is necessary for this proceeding.

## FINDINGS

The Court, therefore, finds as follows: That the land and improvements at true market value in the pertinent years are as follows:

| | 1979 | 1980 | 1981 | 1982 |
|---|---|---|---|---|
| Land | $2,700,000 | $2,916,000 | $ 3,132,000 | $ 3,348,000 |
| Improvements | 6,500,000 | 6,984,000 | 7,568,000 | 8,152,000 |
| Total | $9,200,000 | $9,900,000 | $10,700,000 | $11,500,000 |

I find that the true ratio of assessment as follows:

| | | | | |
|---|---|---|---|---|
| Ratio | .2345 | .2061 | .1695 | .1565 |

I find that the actual assessment in those years is as follows:

| | | | | |
|---|---|---|---|---|
| Land | $ 484,250 | $ 484,250 | $ 484,250 | $ 484,250 |
| Improvements | 3,270,000 | 3,270,000 | 3,270,000 | 3,270,000 |
| Total | $3,754,250 | $3,754,250 | $3,754,250 | $3,754,250 |

I find the correct and legal assessment for those years is as follows:

| | | | | |
|---|---|---|---|---|
| Land | $ 633,150 | $ 600,988 | $ 530,874 | $523,962 |
| Improvements | 1,524,250 | 1,439,402 | 1,282,776 | 1,275,788 |
| Total | $2,157,400 | $2,040,390 | $1,813,650 | $1,799,750 |

SUBMIT JUDGMENT ON NOTICE.

Counsel are directed to call at Chambers to retrieve their exhibits.

DATED: White Plains, New York
February 26, 1985

HON. JOHN C. MARBACH
Justice of the Supreme Court

GRIFFIN, LETSEN, COOGAN & VENERUSO, P.C.
Attorneys for Petitioner
51 Pondfield Road
Bronxville, New York 10708

RICHARD T. BLANCATO
Special Counsel
Town of Greenburgh
Attorney for Respondents
147 Broadway
Hawthorne, New York 10532

CHARLES B. Mc GRODDY, III
Special Counsel
Central School District of
the Tarrytowns
69 South Moger Avenue
Mount Kisco, New York 10549

No. 85-2057 (2)

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

*Appellant,*

— against —

THE STATE BOARD OF EQUALIZATION
AND ASSESSMENT, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE STATE BOARD OF EQUALIZATION AND ASSESSMENT

ROBERT ABRAMS
*Attorney General of the State of New York*
*Attorney for Appellee State Board of Equalization and Assessment*
The Capitol
Albany, New York 12224
Telephone (518) 474-6697
Dated: July 28, 1986

O. PETER SHERWOOD
*Solicitor General*

PETER H. SCHIFF
*Deputy Solicitor General*

MICHAEL S. BUSKUS
*Assistant Attorney General*

*Of Counsel*

20 pp

## Questions Presented

1. Whether ripeness for review in this Court is demonstrated where appellant concedes that all that has yet been resolved (*i.e.*, the equalization rate) is but one element of a tax assessment, where the "valuation" component of such assessments is currently the subject of trials in 168 related proceedings in multiple taxing jurisdictions for many separate tax years.

2. Whether, contrary to *Bi-Metallic Investment Co. v State Board of Equalization*, 239 US 441 (1915), appellant presents a substantial federal constitutional question with its claimed due process right to a hearing on an across-the-board matter of legislative fact, *i.e.*, the equalization rate.

3. Whether appellant has properly framed (Question Presented No. 2 [J.S., p. "i"]) a claim that the State Board of Equalization and Assessment ("State Board") "assessed appellant's real property in a manner contrary to law", when, in reality, appellant's claim rests on an interpretation of ambiguous statutes which divided the courts that first considered the question in 1979-1981, but which statutes were clarified by legislative amendment in 1982 *before* any proof was offered, trials held or judgments entered.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Authorities | iii |
| Counter-Statement of the Case | 1 |
| Decisions Below | 6 |
| Relief Requested | 7 |
| ARGUMENT | |
| Point I | |
| As appellant has failed to satisfy the threshold requirement of finality, this Court does not have jurisdiction of the appeal | 8 |
| Point II | |
| Appellant has no due process right to a hearing on across-the-board matters of legislative fact such as the equalization rate | 9 |
| Point III | |
| Appellant has not demonstrated that its property has been assessed in a manner contrary to law | 10 |
| Conclusion | 13 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Bi-Metallic Investment Co. v State Board of Equalization*, 239 US 441 (1915) | i, 9, 10 |
| *Brooklyn Union Gas Co. v State Board of Equalization and Assessment*, 65 NY2d 472 (1985), *cert denied* ____ US ____, 106 S Ct 1461 (1986) | 10, 11 |
| *Con Ed v State Board*, 73 AD2d 31, *affd* 53 NY2d 975 | 4 |
| *Demorest v City Bank Co.*, 321 US 36 (1944) | 12 |
| *Florida Central Peninsula R.R. Co. v Reynolds*, 183 US 471 (1902) | 12 |
| *Foss v City of Rochester*, 65 NY2d 247 (1985) | 3 |
| *Guth v Gingold*, 34 NY2d 440 (1974) | 3 |
| *Hellerstein, Matter of v Board of Assessors*, 37 NY2d 1 (1975) | 3 |
| *Illinois Central R. Co. v Minnesota*, 309 US 157 (1940) | 12 |
| *Kentucky Railroad Tax Cases*, 115 US 321 (1885) | 11 |
| *Londoner v Denver*, 210 US 373 (1908) | 9 |
| *Minnesota State Board for Commercial Colleges v Knight*, 465 US 271 (1984) | 10 |
| *Nashville C. & St. L. Ry. v Browning*, 310 US 362 (1940) | 11 |

| | Page |
|---|---|
| *People ex rel. Metropolitan Street Railway v State Board of Tax Commissioners*, 174 NY 417 (1903), *affd* 199 US 1 (1905) | 2, 3, 10 |
| *United States v Florida East Coast R. Co.*, 410 US 224 (1973) | 10 |
| *White River Lumber Co. v Arkansas*, 279 US 692 (1929) | 12 |
| **New York State Statutes** | |
| CPLR 5601 | 8 |
| Education Law § 3602 | 4 |
| RPTL article 5 | 5 |
| RPTL article 6 | 5 |
| RPTL article 7 | 5 |
| RPTL article 12 | 9 |
| RPTL article 12-A | 4 |
| RPTL § 102, subd (17) | 2 |
| RPTL § 305 | 3, 11 |
| RPTL § 306 (former) | 3, 4 |
| RPTL § 606 | 3, 4, 5, 6, 7, 9, 10, 11 |
| RPTL § 601, subd 1 | 4 |
| RPTL §§ 700-738 | 5 |
| RPTL § 720(3) | 5, 6, 11 |
| RPTL §§ 740-744 | 5 |
| RPTL § 740(1) | 5, 6 |
| RPTL § 744(1) | 4, 7 |
| RPTL § 1202 | 6, 11 |
| L 1896, ch 908, §§ 170-172 | 2 |
| L 1899, ch 712, §§ 1, 2; former Tax Law § 2 (subd 3) | 2 |

| | Page |
|---|---|
| L 1953, ch 874 | 3, 11 |
| L 1981, ch 1057 | 4 |
| L 1982, ch 714 § 24 | 4, 7, 11 |
| **Federal Statutes** | |
| 28 USC § 1257 | 8 |
| 28 USC § 1257(2) | 8 |
| **New York State Rules and Regulations** | |
| 9 NYCRR subpart 186-6 | 4 |
| **Miscellaneous** | |
| 3 Davis, Administrative Law Treatise (2d ed 1980), § 15:9, p 163 | 9, 10 |
| Cohen & Karger, Powers of the New York Court of Appeals (rev ed 1952), chapter 3 | 8 |
| Lee & LeForestier, Review and Reduction of Real Property Assessments in New York (2d ed 1978), § 8.01 | 2, 10 |
| § 8.04 | 3 |
| R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice (6th ed 1986), § 3.8, pp 122-124 | 8 |
| Report on Special Franchise Assessment Administration (SBEA; December 14, 1983) | 2 |

No. 85-2057

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

*Appellant,*

— against —

THE STATE BOARD OF EQUALIZATION
AND ASSESSMENT, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE STATE BOARD OF EQUALIZATION AND ASSESSMENT

### Counter-Statement of the Case

Appellant's view of the case (J.S. 3-9)[1] is incomplete. A brief explanation of special franchises and their history as a unique class of property will aid in understanding the case, and will demonstrate that appellant's claims are meritless.

[1] References in parentheses to "J.S." refer to pages of the Jurisdictional Statement. Numerical references prefixed by "A" refer to the Appendix to the Jurisdictional Statement.

This litigation involves challenges by a public utility to real property tax assessments on "special franchises", *i.e.*, the pipes, wires and other devices in, on, under or above public thoroughfares and the permission granted by government to place them there. The assessments, commencing in 1974, involve special franchises in New York City and its environs.

Appellant has asserted three theories of assessment error: (1) *overvaluation*, meaning that the "full value" assessed was in excess of actual value; (2) *inequality*, meaning appellant's assessment amounted to a greater percentage of the full value of its property than was true of other properties in the same taxing district; and (3) *illegality*, meaning that there were untimely assessments or erroneous (clerical) computations of the tax.

This appeal involves solely the *inequality* claims of the petitions. None of the inequality petitions has gone to trial. The illegality claims have been dismissed. Many *overvaluation* proceedings have been tried and are *sub judice* in the trial court. No trial has been held; no evidence has been offered; and no evidentiary hearings of any kind have been held in any of the *inequality* cases.

The singular characteristics of special franchises warrant a brief historical review. Unlike ordinary realty, special franchises have always been assessed by the State rather than localities. Lee & LeForestier, *Review and Reduction of Real Property Assessments in New York* (2d ed 1978), § 8.01; *see also, Report on Sepcial Franchise Assessment Administration* (SBEA: December 14, 1983). Special franchises were first taxed in 1899, when the State Board of Tax Commissioners (a predecessor to the current State Board of Equalization and Assessment) was created. L 1896, ch 908, §§ 170-172. The rights of utilities to place pipes, wires, etc. on public property were defined as special franchises and were categorized as a distinct class of real property subject to tax. L 1899, ch 712, §§ 1, 2; former Tax Law § 2 (subd 3); § 42, currently codified at RPTL § 102, subd (17). The tax, including the classification scheme, easily withstood due process and equal protection objections lodged by the utilities. *People ex rel.*

*Metropolitan Street Railway v State Board of Tax Commissioners*, 174 NY 417, 431-435 (1903), *affd* 199 US 1 (1905).

In the more than four-score years since then, special franchises have not been "equalized" in the same manner as ordinary realty and the governing statutes have never so required. *See* Lee & Le Forestier, *op. cit.*, § 8.04. Equalization, in simple terms, means the ratio of assessed value to full value and a property is "equalized" with comparable property when it is assessed at the same fraction of full value as is comparable property. In theory, if all properties were assessed at their full value, there would be no need for an equalization rate for judicial review of assessments. *Foss v City of Rochester*, 65 NY2d 247, 253 (1985). Since properties are not generally assessed at their full value, in an inequality case, a petitioner seeks to have its property "equalized", *i.e.*, its net assessment computed at the same fraction of full value as comparable properties. *See Guth Realty v Gingold*, 34 NY2d 440, 448 (1974). As set forth below, the governing statutes do not require that special franchise properties be assessed, equalized or reviewed judicially in the same manner as ordinary realty.

Any consideration of the special franchise equalization scheme must start with RPTL § 606. Since 1953 (L 1953 ch 874), the Legislature has expressly directed the State Board to assess special franchise properties by applying the latest state equalization rate to the full value of the assessment. Hence, special franchises have been assessed differently from ordinary realty. Ordinary realty was subject either to the old full value assessment provision (former RPTL § 306, the basis for the *Hellerstein* decision)[2] or to the current uniform fractional percentage provision (RPTL § 305), which explicitly allows different ratios of assessment by class of property. Thus, section 606, entitled "Use of state equalization rates and special equalization rates in making special franchise

[2] *Matter of Hellerstein v Board of Assessors*, 37 NY2d 1 (1975). *Hellerstein* held, as a matter of state *statutory* law (*not* constitutional law), that all properties had to be assessed at full value. Thereafter, the Legislature changed the statutes to permit uniform fractional assessments by type of property. RPTL § 305.

assessments", for many years began with the injunction that:

> "Notwithstanding [RPTL § 306][3], in determining a special franchise assessment the state board shall apply the latest state equalization rate * * * to the full value of such assessment * * *." RPTL § 606, subd 1.

In short, the Legislature has always exempted special franchise assessments from the equalization provisions applicable to ordinary realty. This was always implicit in section 606. As set forth below, however, there was prior litigation in the case at bar over the meaning of those statutes. After the courts interpreted the statutes to allow the same type of inequality proof for special franchises as for ordinary realty (*Con Ed v State Board*, 73 AD2d 31, *affd* 53 NY2d 975), the Legislature made its prior assumption explicit. It is that clarifying legislation that appellant challenges here.

The statute to which appellant objects was enacted in 1982. RPTL § 744(1), added by L 1982, ch 714, § 24. It limits proof of inequality for a special franchise holder to the state equalization rate. Equalization rates in New York are not limited to single parcels or single taxpayers. To the contrary, these rates have significant legislative, debt and tax consequences statewide. These rates affect the apportionment of state aid to school districts. *See* Education Law § 3602; *see also*, 9 NYCRR subpart 186-6 (special equalization rates for school aid derived from state rates). These rates also affect computations of state constitutional debt and tax limitations for New York's five largest cities. *See* RPTL Article 12-A. Equalization rates thus have enormous practical consequences for local government finances. Indirectly, equalization rates determine tax rates set by localities, since funding not supplied by the State must be raised by local property tax levies. This history and background, not mentioned by appellant, is critical to a full understanding of the case.

---

[3] The reference to section 306 was deleted when section 306 was repealed. L 1981, ch 1057.

Appellant asserts (J.S. 5) that prior to 1982, *all* owners of real property could prove *inequality* of assessment (*i.e.*, that its property was assessed at a higher percentage of full value than other properties) by any of three methods of proof. Those types of evidence include: [1] "selected parcel" appraisals; [2] "all sales", meaning all actual sales of properties in that tax year; and [3] the state equalization rate ("state rate") (*see* J.S. 5). Appellant fails to mention the complex history of litigation in this very case on the precise issue of whether those three means of proving inequality for ordinary realty owners *also* applied to special franchise holders.

Briefly, the statutory question involved was the meaning of RPTL § 740(1) which authorized judicial review of special franchise assessments "so far as practicable in the manner prescribed by this article for reviewing an assessment of real property." As the statutes read when this litigation was commenced in 1974, there were entirely separate provisions for assessment and review of ordinary realty as distinct from special franchises. *Compare* RPTL Article 5 *with* RPTL Article 6. Even the judicial review provision (RPTL Article 7) contained separate provisions for ordinary realty (RPTL §§ 700-738) and for special franchises (RPTL §§ 740-744).

Thus, RPTL § 740(1), which incorporated by reference only so much of ordinary realty judicial review provisions (*i.e.*, RPTL §§ 700-738) *as was practicable*, took on special significance. The provision governing proof of inequality for ordinary realty, RPTL § 720(3), authorized the three types of evidence (enumerated above). However, RPTL § 606 mandated that the State Board *must* apply the latest state equalization rate. Therefore, the State Board maintained throughout this litigation that the only proof of inequality necessary or admissible for special franchises would be the state equalization rate. Since RPTL § 606 mandated that special franchise assessments be equalized with the latest state rate, any other proof of inequality was irrelevent.

If this statutory discussion does not automatically commend itself to easy understanding, there is no reason that it should. Over

the years of this litigation, prior to the clarifying 1982 amendment, these statutory nuances baffled the courts on questions of statutory interpretation.

*Decisions Below*

A brief chronology of the diversity of judicial interpretation of those statutes *in the case at bar* is necessary. In 1979, the trial court held, purely as a matter of statutory interpretation, that the only relevant evidence for a special franchise holder to prove inequality would be the state rate. A-113 - A-121 (98 Misc 2d 491, 494-498; 413 NYS2d 1012). The Appellate Division, an intermediate court, reversed, with one justice dissenting on the basis of the trial court's opinion. A-105 - A-112 (73 AD2d 31; 425 NYS2d 651). The Appellate Division held, purely as a matter of statutory construction, that special franchise holders could establish the inaccuracy of the state rate by proving that the data used to calculate the rate were inaccurate. Ironically, the court was heavily influenced by "legislative findings" (quoted here by appellant [J.S. 15 & n 9]) enacted *after* the trial court decision in which the Legislature criticized state equalization rates in the context of *ordinary realty* litigation. Those "findings", which characterized state equalization rates as producing "spurious" or "counterproductive" results, prompted the split in the Appellate Division over the statutory interpretation question framed above. A-105 - A-112 (73 AD2d 31; 425 NYS2d 651). Thereafter, the Court of Appeals, by a 4-3 vote, affirmed on the opinion below. A-103 - A-104 (53 NY2d 975; 441 NYS2d 669). Three judges dissented on the basis of the trial court opinion on statutory interpretation. A-104.

All of those opinions (from 1979 through 1981) centered purely on questions of interpreting RPTL §§ 606, 720(3), 740(1) and 1202. All that was resolved by the 1981 Court of Appeals decision (A-103 - A-104 [53 NY2d 975; 441 NYS2d 669]) was that, as a matter of statutory interpretation — *not* constitutional doctrine — special franchise holders could employ the three alternative methods of proof discussed above.

Then, and before *any* evidence was offered, trials held, or judgments entered, the Legislature enacted L 1982, ch 714, adding RPTL § 744(1). This provision plainly limited the admissible proof to dovetail with a special franchise holder's statutory rights defined in RPTL § 606. Appellant now challenges the constitutionality of that 1982 legislation.

All the courts below rejected appellant's constitutional claims. The Court of Appeals, in unanimously affirming on the opinion of the Appellate Division (A-1; 67 NY2d 783; 501 NYS2d 22), adopted that court's reasoning (A-6 - A-13; 103 AD2d 453; 480 NYS2d 789). The unanimous Appellate Division reasoned that "special franchises are inherently different from other types of real property" (A-10; 103 AD2d at 458; 480 NYS2d at 793). The court also concluded that no due process or retroactivity problems were involved since no final determinations had ever been made as to appellant's inequality claims and because the Legislature merely clarified the then-ambiguous statutes before any evidence was received or judgments entered (A-11 - A-12; 103 AD2d at 459-460; 480 NYS2d at 794). In short, every court and every jurist to consider the question has found appelllant's current arguments to be utterly without merit.

*Relief Requested*

This Court should dismiss the appeal on the ground that it does not present a substantial federal question. Alternatively, this Court should affirm for the reasons stated by the courts below.

## *ARGUMENT*

### POINT I

### AS APPELLANT HAS FAILED TO SATISFY THE THRESHOLD REQUIREMENT OF FINALITY, THIS COURT DOES NOT HAVE JURISDICTION OF THE APPEAL.

Appellant relies (J.S. 2 & n 2) on 28 USC § 1257(2) as the sole basis for this Court's jurisdiction. This statute begins with the operative language that "*[f]inal* judgments or decrees * * * may be reviewed by the Supreme Court * * *." 28 USC § 1257 (emphasis added).

The case is not final in any sense. Nor did it even satisfy the state court definition of finality so as to qualify for an appeal as of right *to* the court below. Appellant here obtained only the discretionary permission of the Appellate Division of State Supreme Court to pursue a further appeal to the New York Court of Appeals. 108 AD2d 1014, 491 NYS2d 278 (3d Dept 1985). An earlier appeal, purportedly taken as of right to the Court of Appeals, was dismissed by that court precisely because the appeal lacked finality. 64 NY2d 754 (1984). Appellant has omitted those decisions from the appendix to the Jurisdictional Statement.

The New York Court of Appeals has a statutory finality rule (NY CPLR 5601) which restricts appeals as of right in a manner similar to 28 USC § 1257(2). It operates to keep out of the state's highest court many cases which are incomplete, may never result in a final judgment, may become moot, or otherwise do not merit an immediate appeal. *Compare*, Cohen & Karger, *Powers of the New York Court of Appeals* (rev ed 1952), chapter 3; *with* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* (6th ed 1986), § 3.8, pp 122-124.

Therefore, this case lacks finality under 28 USC § 1257(2). Thus, the appeal should be dismissed for lack of jurisdiction.

## POINT II

### APPELLANT HAS NO DUE PROCESS RIGHT TO A HEARING ON ACROSS-THE-BOARD MATTERS OF LEGISLATIVE FACT SUCH AS THE EQUALIZATION RATE.

In an attempt to fashion a colorable due process claim, appellant has blurred the distinctions between valuation and equalization; has overlooked the difference between legislative facts and adjudicative facts, and has otherwise avoided discussion of settled doctrine emanating from this Court.

Appellant is vigorously pursuing at the trial court level its claims that the special franchise properties are assessed in excess of actual value. However, that right is not to be confused with its unavailing claim made in this proceeding that it is also entitled to challenge the equalization rate which applies to all special franchise properties. *See* RPTL § 606; RPTL, Article 12.

By relying upon *Londoner v Denver*, 210 US 373 (1908) (*see* J.S. at 12, 13), appellant simply mixes apples with oranges. Unquestionably, *Londoner* gives appellant a right to protest alleged *overvaluation* of its own property. *Id.* at 386. However, this appeal involves *equalization*, not valuation. In *Bi-Metallic Investment Co. v State Board of Equalization*, 239 US 441 (1915) (Holmes, J.), this Court held that there is no due process right to a hearing on the broader questions of equalization or tax rates, which apply to all taxpayers. *Id.* at 445. The establishment of such rates is a legislative determination for which there are no due process rights to a hearing. *Id.*

Across-the-board revenue measures applicable to all parties constitute "legislative facts" which do not create entitlement to due process hearings. 3 Davis, *Administrative Law Treatise* (2d ed 1980), § 15:9, p 163. To be sharply contrasted with such broad judgments are facts that are highly specific, narrow, controversial, linked directly to the parties; only these latter "adjudicative"

facts entitle a petitioner to any hearings. 3 Davis, *loc. cit.* As set forth above (p 4), equalization rates — affecting as they do numerous tax, debt and state aid matters — are legislative facts for which taxpayers have no due process right to a hearing.

In short, *Bi-Metallic*, not cited by appellant, is dispositive here. *See also, United States v Florida East Coast R. Co.*, 410 US 224, 244-245 (1973); *Minnesota State Board for Commercial Colleges v Knight*, 465 US 271, 285 (1984).

## POINT III

### APPELLANT HAS NOT DEMONSTRATED THAT ITS PROPERTY HAS BEEN ASSESSED IN A MANNER CONTRARY TO LAW.

In its second question presented (J.S., at i), appellant asserts that its properties have been assessed contrary to law. Appellant boldly contends (J.S. 4-8, 12) that special franchise properties must be assessed in the same manner as — and assessments reviewed by the same proof applicable to — ordinary realty. Indeed, appellant asserts (J.S., 4) that "[t]he reason for this procedure is to assure uniformity of assessment for real property, all of which, including special franchises, is a single class for tax purposes." Appellant is mistaken.

In our counter-statement of the case (*supra*, p 6), we have already unmasked appellant's selective citation to the relevant statutes. We have shown how RPTL § 606 sets up a distinct assessment methodology for the unique class of special franchises. We simply add that there is a long-standing dichotomy between special franchise properties and all other types of realty. *Brooklyn Union Gas Co. v State Board of Equalization and Assessment*, 65 NY2d 472, 485 (1985), *cert denied*, ____US____, 106 S Ct 1461 (1986) (special franchise properties are a "specialty" as to which there is no market); *People ex rel. Metropolitan Street Railway v State Board of Tax Commissioners*, 174 NY 417, 431-435 (1903), *affd*, 199 US 1 (1905) (setting forth early history of this unique type of property); *see also*, Lee & LeForestier, *Review and Reduction of Real Property Assessment in New York* (2d ed 1978), § 8.01.

Appellant's reliance (J.S. 4 & n 5) on RPTL § 1202 does not alter the above analysis. Although section 1202, considered in conjunction with RPTL § 305, provides that for ordinary realty, property should be assessed as near as may be to full value or a uniform fractional percentage thereof, and, thus, incorporates by reference the three types of inequality proof enumerated in RPTL § 720(3), there was no reason to have those types of inequality proof applicable to special franchise properties. For ordinary realty, there is *no* statutory provision which equalizes or reduces the assessment. However, for the unique class of special franchise properties, there is a built-in adjustment in the form of the RPTL § 606 equalization for special franchise properties.[4] A further peculiarity of special franchises is the so-called "pegging law" (L 1953, ch 874) by which the "full value" of pre-1953 property is "frozen" in place and protected from increase in assessment.

Hence, with different types of property, there is no constitutional requirement that the system of taxation be identical. *Kentucky Railroad Tax Cases*, 115 US 321, 337 (1885) (state may classify railroads separately for purposes of taxation); *Nashville C. & St. L. Ry. v Browning*, 310 US 362, 368-369 (1940) (utilities and railroads are separate classes). Hence, appellant's equal protection argument (J.S. 10-11) is frivolous.

Appellant's due process argument grounded in retroactivity (J.S. 12) is equally without merit. As demonstrated above, the governing statutory provisions were ambiguous from 1979 through 1981; were interpreted by sharply divided courts during that time; but were amended and clarified in 1982 (L 1982, ch 714) *before* any proof was offered, trials had or judgments entered. Thus, as the courts below unanimously held (A-14 - A-24 [120 Misc 2d 617; 466 NYS2d 575]; A-6 - A-13 [103 AD2d 453; 480 NYS2d 789];

---

[4] Special franchises have always been a *sui generis* category of property for several reasons: they are essentially a grant of public property permitting pipes, wires, etc. in, on, under or above public streets. Also, they cross many jurisdictional lines. And, of course, there is no market for such properties. *Brooklyn Union Gas Co.*, 65 NY2d 472, 485.

A-1 [67 NY2d 783; 501 NYS2d 22]), no rights vested. A mere change in statutory law for pending cases (where no final judgments have been entered) implicates no constitutional claim, whether couched in due process or retroactivity terms. *See Demorest v City Bank Co.*, 321 US 36, 48-49 (1944) (rejecting vested rights claim predicated on decisional law; holding that even legislation affecting substantive property rights can be amended or clarified and applied to pending proceedings as long as final judgments are not upset). In any event, this Court has long upheld statutes which retroactively classified property in separate categories for purposes of taxation. *Florida Central Peninsula R.R. Co. v Reynolds*, 183 US 471, 473-474 (1902); *White River Lumber Co. v Arkansas*, 279 US 692, 698-699 (1929); *Illinois Central R. Co. v Minnesota*, 309 US 157, 164-165 (1940). In short, appellant's due process and retroactivity arguments have no merit.

## CONCLUSION

THIS COURT SHOULD DISMISS OR AFFIRM.

Dated: Albany, New York
July 28, 1986

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney for Appellee*
*State Board of Equalization*
*and Assessment*

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General
*Of Counsel*

(3)

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2057

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

---

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Appellant,

-against-

STATE BOARD OF EQUALIZATION AND
ASSESSMENT, et al.,

Appellees.

---

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

---

# MOTION TO DISMISS OR AFFIRM
# ON BEHALF OF INTERVENOR-APPELLEE
# CITY OF NEW YORK

---

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel
of the City of New York
100 Church Street, Room 6-A-4
New York, New York, 10007
(212) 566-2204
Attorney for Appellee
City of New York

CORRECTED COPY

Edith I. Spivack
John P. MacArthur
of Counsel

July 30, 1986

55 pp

## Questions Presented

The position of New York City, on this appeal is in all significant respects the same as that of appellee State Board of Equalization and Assessment. Accordingly, the City joins in the brief submitted on behalf of SBEA and discusses in this brief only the following questions:

1. Whether New York State Real Property Tax Law, §744(1), clarifying the binding effect of the State equalization rate in a challenge to a special franchise assessment as unequal, denies appellant due process, equal protection or any other federal right.

2. Whether this proceeding is justiciable in view of the fact that the

equalization factor is only one element in finding the assessed value of property for tax purposes and that value in the case at bar has not been finally determined.

TABLE OF CONTENTS


QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS 3

STATEMENT 4

ARGUMENT 10

RPTL §744(1) DOES NOT DEPRIVE APPELLANT OF THE RIGHT TO ANY HEARING ON THE EQUALIZATION RATE TO WHICH IT IS OTHERWISE ENTITLED. MOREOVER, THE SEPARATE CLASSIFICATION OF SPECIAL FRANCHISES FOR TAX PURPOSES HAS A RATIONAL BASIS AND DOES NOT VIOLATE EQUAL PROTECTION.

a. Due process 10

b. Equal protection 17

c. Finality 25

CONCLUSION 33

APPENDIX i

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Cases | |
| Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1941) | 10 |
| Brady v. Maryland, 373 U.S. 83 (1963) | 29 |
| Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) | 15, 18 |
| California v. Stewart, 384 U.S. 436 (1966) | 29 |
| California Nat. Bank v. Stateler, 171 U.S. 477 (1898) | 26 |
| Cincinnati, New Orleans & Texas Pacific Railroad Co. v. Kentucky (Kentucky Railroad Tax Cases), 115 U.S. 321 (1885) | 17 |
| City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) | 23, 24, 30 |
| Clark v. Williard, 292 U.S. 112 (1934) | 26 |
| Collins v. Miller, 252 U.S. 364 (1920) | 25, 26 |
| Consolidated Edison Company, Inc. v. State Board of Equalization and Assessment, ___ Misc.2d ___ (Sup. Ct., Albany Cnty, Conway, J.; NOR) | 5 |

60 A.D.2d 356, 401 N.Y.S.2d 871 (3d Dept. 1978), mot. for lv. to app. den., 45 N.Y.2d 706, 380 N.E.2d 338, 408 N.Y.S.2d 1025 (1978)

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 23, 28, 29, 30

Department of Banking v. Pink, 317 U.S. 264 (1942) 26

Hillsborough Township v. Cromwell, 326 U.S. 620 (1946) 18

Houston v. Moore, 3 Wheat. 433 (1918) 26

Jamaica Water Supply v. State Board, 196 N.Y. 39, 89 N.E. 581, 156 N.Y.S. (1909) 18, 19

Kentucky Railroad Tax Cases; see Cincinnati, supra 10

Long Island Railroad v. State Board, 104 Misc. 234, 171 N.Y.S. 784 (S.Ct., Kings Cnty, 1918), mod. 193 App. Div. 297, 183 N.Y.S.2d 733 (2d Dept. 1920), rev'd 231 N.Y. 221, 131 N.E. 896, 189 N.Y.S. (1921) 18, 19

Market Street R. Co. v. Railroad Commission, 324 U.S. 548 (1945) 25

Matter of County of Nassau v. State Board, 80 A.D.2d 9, 437 N.Y.S.2d 793 (3d Dept. 1981) 11

Matter of State Bd. v. Kerwick, 72 A.D.2d 292 (3rd Dept., 1980), 425 N.Y.S.2d, aff'd 52 N.Y.2d 557 (1981) 11

Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892) 25

Metropolitan Street Railway v. State Board, 174 N.Y. 417, 67 N.E. 69, 134 N.Y.S. (1903), aff'd 199 U.S. 1 (1905) 18

Miami Herald Publishing Co. v. Tornillo, 481 U.S. 241 (1974) 29

Mills v. Alabama, 384 U.S. 214 (1966) 28

NAACP v. Williams, 359 U.S. 550 (1959) 27

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 27, 29

O'Dell v. Espinoza, 456 U.S. 430 (1982) 26

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 28, 29

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 26



BEST AVAILABLE COPY

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) 26

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) 18

State Railroad Tax Cases, 92 U.S. 575 (1875) 11

Staten Island Edison Corp. v. Moore, 6 Misc.2d 1031, 164 N.Y.S.2d 772 (S.Ct., Albany Cnty, 1955), rev'd on other grounds, 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dept. 1961), on remand, 37 Misc.2d 198, 238 N.Y.S.2d 443 (S.Ct., Albany Cnty, 1961), aff'd, 15 A.D.2d 983, 225 N.Y.S.2d 520 (3d Dept. 1962), aff'd 12 N.Y.2d 846, 187 N.E.2d 475, 236 N.Y.S.2d 624 (1962) 18, 19

**Statutes**

U.S. Sup. Ct. Rule 16.1 1

28 U.S.C. § 1257 (2) 3, 31

N.Y. Const. Art. VIII, § 4 14

N.Y. Admin. Proced. Act, § 102 11

N.Y. Educ. Law, §§ 3602, 3603 14

N.Y. Real Prop. Tax Law

Article 6 12, 17
Article 7 12, 17
Article 12 12-13
§ 302 17
§ 534 21
§ 542 21
§ 606 15, 17, 19
§ 608 12
§ 610 12
§ 712 19
§ 740 19
§ 744 (1) 3-4; et ff.
§ 1202 13
§ 1208 12
§ 1212 13

N.Y. Tax Law § 45 19

N.Y.L. 1896, c. 908 19

§§ 36, 250 19

N.Y.L. 1899, c. 712 19

§§ 44, 45 19

No. 85-2057

---

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

---

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

Appellant,

-against-

STATE BOARD OF EQUALIZATION AND
ASSESSMENT, et al.,

Appellees.

---

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

---

MOTION TO DISMISS OR AFFIRM

---

Pursuant to Rule 16.1, City of New York (hereafter the City), intervenor in the proceedings below and one of the appellees before this Court, moves that the appeal filed on behalf of appellant Consolidated Edison Company of New York, Inc. (sometimes Con Ed) be dismissed or, in the

alternative, that the judgment of the Court of Appeals of the State of New York be affirmed.

## Opinions Below

The opinion of the New York Court of Appeals is reported at 67 N.Y.2d 783, 501 N.Y.S.2d 22, 492 N.E.2d 130 (1986). The opinion of the Appellate Division, Third Department, is reported at 103 A.D.2d 453, 480 N.Y.S.2d 789 (1984). The opinion of Special Term of the Supreme Court for Albany County is reported at 120 Misc.2d 617, 466 N.Y.S.2d 575 (1983).[1] These opinions are reproduced at J.S.A-1, 6, 13, 14-24.

---

[1] References in parentheses to "J.S." refer to pages of Jurisdictional Statement. Numerical references prefixed by "A" refer to the Appendix to the Jurisdictional Statement.

## JURISDICTION

The Court of Appeals decision was issued on March 18, 1986. Appellant filed a Notice of Appeal to this Court with the Clerk of the Court of Appeals on June 7, 1986, and with the Clerk of Albany County June 11, 1986. A-28-31. Allegedly, this Court has jurisdiction under 28 U.S.C. §1257(2).

## STATUTORY PROVISIONS

The justiciability question which the City raises and the only basis for appeal invoked by Con Ed involves 28 U.S.C. §1257(2) (J.S.3). In pertinent part this provides:

> Final judgments or decrees rendered by the highest court of a state ... may be reviewed ... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution...

The State statute complained of is New York Real Property Tax Law (RPTL),

§744(1). It is set forth in full at page 1 of the Appendix hereto. Insofar as relevant it provides:

> ...evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate ... [which] ... shall be binding and conclusive on the parties upon any such issue.

## STATEMENT

The City joins in the Counter-Statement of the Case presented in pages 1 to 7, inclusive, of SBEA's motion papers. Added herein is only additional detail as to the present status of the litigation involving various other appellees, political subdivisions like the City, in which Con Ed also maintains special franchises, to stress the wide dependency of governmental entities upon the tax revenues derived from this source.

Appellant initially urged all three grounds (not two; J.S. 6) provided under New York law for reviewing assessments:

namely overvaluation, inequality and illegality (J.S. A-7). At issue are, or were, claims in some thirty-five taxing jurisdictions for the twelve years from 1974-1985. Their present status, illustrative of the lack of finality, is:

a) following initial consolidation of the petitions from 1974 through 1977 into a single proceeding, SBEA and the municipalities moved for and were granted dismissal of the illegality claims therein; this order was appealed to the State's intermediate appellate court, which affirmed, and Con Ed's motion for leave to appeal to the highest State court was denied[2]. The

---

[2] Consolidated Edison Company, Inc. v. State Board of Equalization and Assessment, _____ Misc. 2d _____ (Sup. Ct., Albany Cnty, Conway, J;NOR); 60 A.D.2d 356, 401 N.Y.S. 2d 871 (3d Dept. 1978), mot. for lv. to app. den., 45 N.Y.2d 706, 280 N.E. 2d 338, 408 N.Y.S.2d 1025 (1978).

illegality claims for the remaining eight years are sub judice at the trial court level.

b) the overvaluation claims for all twelve years have been tried and are sub judice at the trial court level except for those relating to 1974, which have been dismissed.[3]

c) as to the inequality portions, assessment review on grounds of inequality requires that a petitioner establish two facts: the full value of the property and the equalization rate. Either without the other is meaningless, because at issue is the product of the two, and the same product can be produced with an infinite array of rates so long as a corresponding infinite array of values remains possible.

---

[3] Appendix, p. 2

The full value issues of Con Ed's special franchises are all sub judice at the trial court level except for the 1974 claims. The petitions for this year have been dismissed in all respects. Motions by the municipalities and SBEA for partial summary judgment on the question of the equalization rate were granted by two separate orders. That relating to the last eight years in issue (1978 through 1985) was made on July 10, 1986, and the time to appeal therefrom to the intermediate appellate court has not yet expired. The order relating to the first four years, 1974 through 1977, was appealed by Con Ed, affirmed by the highest State court, and is now the subject of this appeal. There is no doubt that Con Ed will appeal the second also.

In sum, none of the illegality questions are presented here, the time to appeal the order dismissing those for the first four

years having long expired and those for the next eight years still sub judice at the trial court level. None of the value questions are presented here, all being sub judice at the trial court level except those relating to 1974, which have been dismissed. Eight of the twelve years of equalization rate questions have only recently been decided at the trial court level, and will be appealed to the State's intermediate appellate court. What is in issue here are soley the remaining four years of equalization rate.

In essence, it is appellant's position that there is only one class of property in New York and that, because the statute in issue limits a hearing on equalization rates with respect to special franchises, its equal protection rights as well as its due process rights have been violated (J.S. 12-14, 14-16).

SBEA, all the intervening municipalities, and the courts below maintain that appellant is in error on every point, to which the City adds that this case is not yet even justiciable, may never become so, and is already partly moot.

## ARGUMENT

**RPTL §744(1) DOES NOT DEPRIVE APPELLANT OF THE RIGHT TO ANY HEARING ON THE EQUALIZATION RATE TO WHICH IT IS OTHERWISE ENTITLED. MOREOVER, THE SEPARATE CLASSIFICATION OF SPECIAL FRANCHISES FOR TAX PURPOSES HAS A RATIONAL BASIS AND DOES NOT VIOLATE EQUAL PROTECTION.**

1. Due Process

Appellant's contention that it has a right to a hearing with respect to the State rate is flawed on several grounds. Initially, it is not constitutionally entitled to any hearing at all, since it is well settled that ascertaining an equalization rate is a legislative, not an adjudicatory, function.[4] To

---

[4] "I am of the view that due process does not require such a review. The equalization rate is considered a legislative act and thus, no hearing, much less a full hearing, is constitutionally required. See Bi-Metallic Co. v. Colorado, 239 US 441; Kentucky R.R. Tax Cases, 115 US 321, supra; State

(Footnote Continued)

this should be added that, in any event, it is not entitled to multiple hearings, and at least one is already provided elsewhere in the statutes.

Although it is true that a hearing on the equalization rate is foreclosed in an RPTL Article 7 proceeding, its role as only one element in determining assessed value is evidenced by the fact that, notwithstanding, appellant concluded a full hearing with respect to value under Article 7. The

---

(Footnote Continued)
R.R. Tax Cases, 92 US 575.) Moreover the State Administrative Procedure Act, the provisions of which are applicable to the SBEA (Matter of State Bd. of Equalization & Assessment v. Kerwick, 72 AD2d 292), lends support to this determination. The establishment of a rate is considered rule making (see State Administrative Procedure Act, 102, subd 2, par [a], cl [ii]), rather than an adjudicatory proceeding. As such, it has been held that a municipality, which has standing to contest the rate, is not entitled to a formal adversarial hearing (See Matter of County of Nassau v. State Bd. of Equalization & Assessment, 80 AD2d 9.)." Opinion of the trial court herein; J.S. A-21.

weakness in appellant's argument is that the statute under attack says nothing at all about hearings.

Provision for hearing with respect to rate is found in Article 6 of the RPTL, more particularly sections 608 and 610 thereof. As the trial court plainly said (J.S.A - 8, 21) :

> Avenues are available for ConEd to question the rate. A complaint can be voiced in a proceeding brought under Article 6 of the Real Property Tax Law (see Real Property Tax Law, §608) and a hearing will be had thereon.
>
> ...they may request notice of hearings conducted pursuant to section 1208 of the Real Property Tax Law.

Appellant has never yet sought an Article 6 hearing or a hearing under Article 12, more particularly §1208, during the period when the rates are established. It had its first opportunity, along with everybody else, to seek such reviews some thirteen years ago. Since it chose not to do

so then, nor in any of the dozen years thereafter and offers no reason why it should now be relieved of the consequence of this choice, it is clear that there is no reason. It cannot justifiably complain, therefore, that it lacks that which it has never even tried to obtain.

Appellant implies that it never had notice of the rate, and says flatly that only the municipalities are entitled to either notice or a hearing (J.S. 5). This is not so. After SBEA, as required by RPTL §1202, makes an annual finding of the equalization rate in each jurisdiction, the rate becomes a matter of public record and notice. It is filed in various state and local public offices (RPTL §1212) and becomes readily available and well known to all who are affected by it. This is particularly true for all utility companies to which it is a matter of special concern. Then, if ever, is the proper time

to question it. By the time it is thereafter applied to special franchise assessments in the following year, it has been utilized for dozens of other purposes, many of vast importance.[5] The State is under no obligation, constitutional or other, to provide still another hearing opportunity at that late date.

Appellant's contentions that "§744 (1) deprived the appellant of a hearing on its claim that its real property was assessed [unequally]" (J.S. i:2) and that SBEA assessed its real property in a manner contrary to law (J.S. i) are misleading.

As the most cursory inspection of Section 744(1) (Appendix, p. 1) makes

---

[5] For instance, limitation of municipal tax, N.Y. Const., Art. VIII, §4; apportionment of state aid to schools, N.Y. Ed. Law, §§3602, 3603; and many other provisions in the RPTL and elsewhere.

clear, it says nothing about hearings. As previously noted, provisions with respect to hearings are set forth in other statutes and regulations as to which appellant does not seek review. The statute of which it complains deprived it neither of a hearing nor anything else.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930), which appellant urges as controlling (J.S. 14), is barely relevant. There, petitioner was taxed on full value, with no equalization applied at all; here, equalization is mandated by statute (RPTL §606). There, no hearing at all was permitted; here, appellant was not only entitled to a hearing, but given the opportunity to conclude a plenary trial on the value of all four hundred of its special franchise claims. The equalization rates applied to each franchise for each year in each municipality were stipulated by all

parties in the proceedings and at least one opportunity for a hearing on rate always existed.

What the utility really seeks by this litigation is to gain for itself two opportunities to try the question or, at least, to be able to choose between two (or more) procedures. But this raises no constitutional question. While a State may, if it chooses, provide innumerable hearings or hearing opportunities, it is constitutionally required to provide no more than one. The City submits that, with respect to the instant issue, there is no constitutional requirement even for one hearing, and that neither here nor anywhere are two hearing opportunities ever required, particularly where at least one is and always has been available. This being so, there is no federal question presented here and no

other "due process" claim is even propounded.

2. Equal Protection

Appellant argues that all property is in the same "class" (J.S. 10-11): it errs. For purposes of taxation, property has for many years been divided by the New York legislature into two (or more) classes, the two of relevance here being special franchises and all other property. The Court has held that this classification is rational. Cincinnati, New Orleans & Texas Pacific Railroad Co. v. Kentucky (Kentucky Railroad Tax Cases), 115 U.S. 321 (1885). It is established by the legislature and, since 1899, has been what is now set forth in RPTL §606. It was not created by §744 (1), but by all of RPTL Article 6 (J.S. A-10), as well as all of Title 2 of Article 7, §302 and various other statutes.

Appellant offers seven authorities in support of its position, three of which are cited only for the proposition that like properties should be similarly taxed.[6] This is true, but irrelevant. In none of the remaining four was class directly in issue.[7]

---

[6] Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923; J.S. 10); Hillsborough Township v. Cromwell, 326 U.S. 620 (1946; J.S. 11); Brinkerhoff-Faris Co. v. Hill, supra, p. 15 (J.S. 11).

[7] Metropolitan Street Railway v. State Board, 174 N.Y 417, 617 N.E. 69, 134 N.Y.S. (1903), aff'd 199 U.S. 1 (1905); Jamaica Water Supply v. State Board, 196 N.Y. 39, 89 N.E. 581, 156 N.Y.S. (1909); Long Island Railroad v. State Board, 104 Misc. 234, 171 N.Y.S. 784 (S. Ct., Kings Cnty 1918), mod. 193 App. Div. 297, 183 N.Y.S.2d 733 (2d Dept. 1920), rev'd 231 N.Y. 221, 131 N.E. 896, 189 N.Y.S. (1921); Staten Island Edison Corp. v. Moore, 6 Misc.2d 1031, 164 N.Y.S.2d 772 (S. Ct., Albany Cnty, 1955), rev'd on other grounds, 6 A.D.2d 369, 177 N.Y.S. 129 (3d Dept. 1961), on remand, 37 Misc.2d 198, 238 N.Y.S.2d 520, affd. 15 AD2d 983, 225 N.Y.S. 2d 520 (3d Dept. 1962), aff'd, 12 N.Y.2d 846, 197 N.E.2d 475, 236 N.Y.S.2d 524 (1962).

However, even so, this Court in Metropolitan Street Railway and the New York Court of Appeals in Jamaica Water upheld the statute which separated special franchise assessments from all other property assessments with regard to the basis factor of who did the assessing.[8] The New York Court in Long Island Railroad upheld the statute[9] which applied a set of procedural rules to all other kinds of real property, but "only so far as practicable, to special franchises.[10] In Staten Island, the Court also upheld the statute[11] that separated

---

8 Chapter 712, Laws of 1899, a predecessor of RPTL §606.

9 Chapter 712, Laws of 1899, sections 44 and 45; Chapter 908 Laws of 1896, sections 36 and 250; predecessors of RPTL §740.

10 231 N.Y. 221, 226; 131 N.E. 896, 189 N.Y.S. (1921).

11 Tax Law, former section 45 a predecessor RPTL to §606.

special franchises from all other properties for equalization by SBEA[12].

But there is no need to search so far inasmuch as the appellate court here considered this very argument at some length (J.S. A-9, A-10). The deliberated finding was that the legislature has the power to classify and that the statute in issue was only the enactment of a procedural rule relating to evidence of rate, well within the legislative function.

It might also be pointed out that appellant, despite its frequent claims to the contrary,[13] is not singled out from all other taxpayers in this respect. The State rate is

---

12 12 N.Y. 2d 846, 847; 187 N.E.2d 475; 236 N.Y.S.2d 624, 625.

13 e.g., "Other real property of the same class": (J.S. 4); "all other real property" (J.S. 4, 11); "assessments of other real property" (J.S. 4).

also the exclusive equalization method applied to reforestation lands (RPTL § 534), State lands (RPTL, §542) under other sections of the Real Property Tax Law, as well as to all special franchises, not only those held by this appellant.

Finally, whether or not there is but one class of property in New York and whether or not the utility is in that class is a matter of State law. All three courts below said that all utilities and special franchises are in a class of their own, that such a class has a rational basis and, because of its unique features is a proper class. This being so, no federal question is presented. No other equal protection claim is even propounded except as to a hearing, which as demonstrated above, has no merit and also involves no federal question.

Appellant's attack on the constitutionality of RPTL §744(1) for lack of

hearing overlooks the relevant fact that this statute neither provides nor implies anything about a hearing. The availability or unavailability of a hearing on rate depends upon other statutes and provisions. Unless and until those authorities are invoked, the question of statutory constitutionality or any question concerning a hearing cannot be brought before this Court. Indeed, this proceeding is not properly even an appeal, since the statute raises no constitutional question.

This being so, again there is no federal question presented. Even by the broadest possible view, the most that any litigant can ask is to be given a hearing. This Court has never asserted the power to order a State in enacting a law to provide a hearing under one particular article of a law, as against another article of the same title, least of all on constitutional grounds.

The instant proceeding is not, and may never become, ripe for presentation to this Court, because if sufficiently high values are found by the trial court, even the rates sought by the utility would still sustain the assessments and render this proceeding entirely moot.

Appellant seeks to circumvent mootness by stating in a footnote on the authority of City of Philadelphia v. New Jersey,[14] and Cox Broadcasting Corp. v. Cohn,[15] that it has "relinquished" its 1974 values claims and thereby allegedly satisfied the finality requirement (J.S. 2., n. 2). However, these cases do not speak to the principal problem here. The "relinquishment" of a small portion of a consolidated claim, leaving

---

14 437 U.S. 617 (1978).

15 420 U.S. 469 (1975).

the other eleven twelfths still at issue, is the emptiest of gestures; all other claims were dismissed with prejudice in City of Philadelphia, leaving nothing sub judice or to be tried.

Worse yet, "relinquishment" of even the entire value claim does not establish value. That establishes only that a petitioner cannot impeach any value against which any rate might ultimately be applied. And that is the reason the 1974 petitions were not merely limited by an order for partial summary judgment, but were dismissed and the assessments confirmed (Appendix, p. 7).

In sum, as to 1974 this proceeding is now moot; as to the next three years it is not yet ripe, there having yet been no decision of full value even at the trial court level, much less at the highest State court level. The same is true of the eight years after that, as to which even the "illegality"

issues are still sub judice at the trial court level.

3. Finality

Literal finality imports a judgment which "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."[16] Further, in the case of multiple parties, it must be final with respect to all of them.[17] What must have been resolved is all issues, not just principal ones. "[F]or example, where liability has been determined and all that needs to be adjudicated is the

---

16 Market Street R. Co. v. Railroad Commission 324 U.S. 548, 551 (1945).

17 Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608, 611 (1892); Collins v. Miller, 252 U.S. 364, 370.

amount of damages",[18] the judgment is not final. Lacking all of this, the judgment is not only not technically final, but it is not even practically final.[19]

Nor are the unresolved elements here ministerial[20] or collateral.[21] They go to the very heart of liability itself, much more than did the unresolved accounting elements in such cases as California Nat. Bank[22] or

---

18 Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948); Collins v. Miller, 252 U.S. 364, 370 (1921).

19 Houston v. Moore, 3 Wheat. 433, 434 (1918); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 632-3 (1981); O'Dell v. Espinoza, 456 U.S. 430 (1982).

20 Dept. of Banking v. Pink, 317 U.S. 264, 267 (1942).

21 Clark v. Williard, 292 U.S. 112, 117-19 (1934).

22 California Nat. Bank v. Stateler, 171 U.S. 477 (1898).

NAACP[23] which rendered nonfinal the judgments there sought to be reviewed.

The reasons why the rule of finality is the embodiment of important policy issues and not merely an arbitrary abstraction include the avoidance of piecemeal review, of advisory opinions and of excessive federal intrusion in State processes.[24] The rule has its exceptions, particularly when the course of behavior of the parties, or an entire industry, depends upon prompt and authoritative decision. But this case involves no behavioral modification, no otherwise irreparable harm, and no other consideration than money.

---

23 NAACP v. Williams, 359 U.S. 550 (1959).

24 North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

Nor does this proceeding fit any of the "very few"[25] circumstances which comprise the four categories of cases, adumbrated by Justice White in Cox Broadcasting (supra, p. 21), as to which the Court is prepared to accept a "practical" construction of the finality criterion. This is not a first category case as to which the federal issue cannot be mooted and is conclusive, or in which the outcome of further proceedings is preordained.[26]

This is not a second category case, as to which the federal issue will survive and require decision and the other issues can "not remotely give rise to a federal

---

25 Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

26 As was Mills v. Alabama, 384 U.S. 214 (1966), cited in Cox Broadcasting at 479.

question",[27] as in Brady v. Maryland[28] and Radio Station WOW.[29]

This is not a third category case, as to which later review of the federal question cannot be had regardless of the outcome of the case.[30]

Finally, this is not a fourth category case, where reversal of the State court on the federal issue will preclude further litigation.[31] This is simply, as Justice

---

27 Radio Station WOW, Inc. v. Johnson, 326 U.S. at 127, supra, p. 30, n. 29.

28 373 U.S. 83 (1963), cited in Cox Broadcasting at 480.

29 p. 30, n. 28.

30 As were California v. Stewart, 384 U.S. 436 (1966) and North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra, p. 29, n. 24, cited in Cox Broadcasting at 481.

31 As was Miami Herald Publishing Co. v. Tornillo, 481 U.S. 241 (1974), cited in Cox Broadcasting at 484.

White concluded his catalog, a matter "controlling the nature and character of, or determining the admissibility of evidence in" a (putative) State proceeding still to come.

Both Cox Broadcasting and City of Philadelphia, supra, p. 25, the only two authorities cited by for the proposition that this case is in proper condition to be presented to this Court are among the strongest authorities for precisely the opposite position. And the City is aware of no authority whatever which suggests that this Court has jurisdiction under 28 U.S.C. §1257 (2), the only source of jurisdiction invoked by appellant (J.S. 2).

One argument to which appellant resorts reflects the self-serving coloring with which it seeks to overcome the lack of merits in its appeal. It claims that:

> [it] has repeatedly urged ... that the equalization rates ... were illegally, intentionally, and

> systematically increased by the State Board for political and other reasons ...
>
> None of the appellees has ever denied the allegations of ... inaccuracies in the equalization rates (J.S. 6).

This notion is obviously of recent vintage. As shown in the 1974 petition, set forth in the Appendix to its Jurisdictional Statement (J.S. A-51 through 56) from which the 1974 Complaint to SBEA and the statement in support thereof, previously annexed thereto and incorporated therein (J.S. A-53, 56) are now deleted, there is not a word in any of them, which remotely suggests that the rates were intentionally and systematically increased for political or other reasons.

The affidavit in which Con Ed first enunciated this idea is not dated in 1974, as it implies; it is dated November 22, 1982 (J.S. A-50), eight years later and long after

this proceeding had been consolidated and the first series of motions were made seeking its dismissal.

Furthermore, the rate allegations in those portions of the petition set forth at J.S.A-51 through 56 urging inequality were explicitly denied in the answer filed in response thereto, and all allegations in the petition are deemed denied by SBEA as a matter of statutory law (RPTL, §712).

In no event does this latest stance support a claim of inequality. If anything, it is a claim of illegality, properly made under New York law, and in fact made by this appellant. But the illegality portion of the claim was either dismissed years ago or is still sub judice at the trial court level (see p. 5 supra). This argument, if such it be, therefore, is not before this Court at all.

## CONCLUSION

For the foregoing reasons this appeal should be dismissed or, in the alternative, the order of the Court of Appeals should be affirmed.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.

Corporation Counsel
of the City of New York
100 Church Street, Room 6-A-4
New York, New York, 10007
(212) 566-2204
Attorney for Appellee,
City of New York

Edith I. Spivack
John P. MacArthur
of Counsel

July 30, 1986

# APPENDIX

TABLE OF CONTENTS

N.Y. Real Property
Tax Law §744 (1) Appendix-1

Order, New York
Supreme Court, 7/10/86 Appendix-2

Final Judgment, New York
Supreme Court, 7/10/86 Appendix-7

NEW YORK REAL PROPERTY TAX LAW, ARTICLE 7

TITLE 2 - Special Provisions Relating to Special Franchise Assessments

§744. Action by court in proceedings to review special franchise assessments

1. In a proceeding to review a special franchise assessment, upon filing of the answer or upon joinder of issue the court may take such evidence as it may deem necessary or may appoint a referee to take evidence and hear and determine all questions raised by the petition and the answer thereto. Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue. Upon motion of either party the court may order the place of trial changed to the county in which the special franchise under review is situated. The place of trial shall be deemed changed to the county designated and the papers and proceedings shall be certified to that county in a manner provided by law in the case of a change in the place of trial of an action and all subsequent proceedings shall be had in the county so designated as if the special proceedings had been originally instituted in that county.

At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the 10th day of July 1986.

P R E S E N T :

HON. THOMAS J. LOWERY, JR.,
Acting Supreme Court Justice.

----------x

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.

Petitioner,

-against-

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondent and Intervenors-Respondents.

Index Nos. 0278/78 5155/84 4020/85,

ORDER

----------x

Petitioner, Consolidated Edison Company

Appendix - 2

of New York, Inc. ("Con Edison"), having moved for an order declaring RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void and the respondent, State Board of Equalization and Assessment ("SBEA"), and intervenors-respondents, The City of New York, et al., having cross-moved for an order granting partial summary judgment dismissing those portions of those petitions which seek to establish erroneous assessments by reason of inequality in that the respondent, SBEA, arrived at and applied incorrect equalization rates in establishing special franchise assessments for the tax years 1978/79 through 1985/86 and which seek to establish what the equalization rates should be by substituting equalization rates derived from current sales in each of the taxing units in the place and stead of the equalization rates found by the SBEA on the grounds that

inequality in proceedings commenced pursuant to RPTL §740, may not be proved by resort to evidence reserved for traditional inequality proceedings brought pursuant to RPTL §706 and that petitioner may neither disprove the actual equalization rate utilized by the SBEA nor prove what the equalization rate should be; and said motions having regularly come on to be heard on the 7th day of July 1986;

NOW, upon reading and filing the notice of motion for declaratory judgment of Con Edison dated June 10, 1986, the affidavit of Mark S. Tulis, sworn to June 10, 1986, in support of the motion, the notice of cross-motion, dated June 13, 1986, the affidavit of John P. MacArthur, sworn to June 13, 1986, the affirmation of Lawrence Zimmerman, dated June 23, 1986, the affidavit of Daniel G. Donovan, dated June 27, 1986, the affidavit of Marvin S. Fink,

sworn to June 30, 1986, and the affidavit of Jonathan P. Nye dated July 2, 1986, all in support of the cross-motion and in opposition to the motion; and after hearing Mark S. Tulis, Special Counsel to Con Edison, in support of the motion and in opposition to the cross-motion and John P. MacArthur, Special Counsel to the corporation counsel of the City of New York, and Lawrence Zimmerman, Assistant Attorney General, of Counsel, on behalf of the respondent SBEA, in opposition to the motion and in support of the cross-motion, and due deliberation having been had thereon; and the Court having rendered its oral decision on July 7, 1986, it is

ORDERED, that petitioner's motion seeking to declare Real Property Tax Law §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void is in all respects denied, and it is

FURTHER ORDERED, that the cross-motion by intervenor-respondents, City of New York, et al. be and the same is, in all respects, GRANTED, and that the respondent and intervenor-respondents have partial summary judgment against the petitioner dismissing the portions of those petitions seeking to establish that the petitioner's assessments were unequal in that the equalization rates used by the State Board of Equalization and Assessment in determining the assessment did not represent that ratio between assessed valuation and full valuation in the taxing units where the petitioner's property was situated.

Dated: Syracuse, New York
July 10, 1986

E N T E R:

/s/ Thomas J. Lowery, Jr.
Honorable Thomas J. Lowery, Jr.
Acting Supreme Court Justice

At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the 10th day of July 1986.

P R E S E N T:

HON. THOMAS J. LOWERY, JR.,
Acting Supreme Court Justice.

----------x

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

-against-

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondents,

-and-

VILLAGE OF PLEASANTVILLE, et al.,

Intervenors-Respondents.

FINAL JUDGMENT

Index Nos.

11747/74 1555/75
1556/75 1557/75
1558/75 1559/75
1560/75 1561/75
1562/75 1563/75
1564/75 1565/75
1566/75 1567/75
1568/75 1569/75
1570/75 1571/75
1572/75 1573/75
1574/75 1575/75
1576/75 1577/75
1578/75 3026/75
3027/75

----------x

Petitioner, Consolidated Edison Company of New York, Inc., having brought the above-entitled proceedings to reduce the assessments on its special franchise property located in the City of New York and certain Westchester Municipalities in which it owns special franchise property for the 1974/75 tax year; and the issues in the proceedings having duly come on to be heard before the Honorable Thomas J. Lowery, Jr., Acting Supreme Court Justice at a Special Term of this Court, held at the State Office Building, 333 East Washington Street, Syracuse, New York; and

WHEREAS, the proceeding were consolidated with proceedings for tax years 1975/76 through 1977/78 by order of the Supreme Court; and

WHEREAS, the Court having ruled on September 24, 1983 granting the motion of the respondents and intevenors-respondents

granting them partial summary judgment against the petitioner dismissing the portions of the petitions seeking to establish that the assessments of petitioner's property were unequal in that the equalization rates used by the State Board of Equalization and Assessment ("SBEA") in determining the assessment did not represent the ratio between the assessed valuation and full valuation in the taxing units where petitioner's property was situated and further denying petitioner's cross-motion seeking to declare RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void; and said order having been affirmed by the Appellate Division Third Department and the Court of Appeals; and,

WHEREAS, petitioner has consented solely with respect to the above-entitled proceedings to accept as the full value of

petitioner's property the values set forth in the appraisals of the SBEA submitted in evidence at trial for its "Frozen Base" and "Subsequent" property without admitting to the correctness of the SBEA's appraisals for other proceedings or years;

NOW, on motion of Rosenberg & Tulis, Special Counsel for petition[er], it is adjudged and decreed as follows:

1. The proceedings set forth above are hereby severed from the proceedings for tax year 1975/76 through 1977/78, and are separately consolidated for disposition.

2. RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, is declared constitutional and applicable to the within proceedings.

3. The assessments in question are hereby confirmed and the petitions dismissed, without costs.

Judgment signed this 10th day of July 1986.

/s/ Thomas J. Lowery, Jr.
Thomas J. Lowery, Jr.

ConEd FinalJudg/Pleasantville2.070186

Appendix - 11

Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2057

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

*against*

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## MOTION TO DISMISS OR AFFIRM

*Of Counsel:*

MARVIN S. FINK
Harwood Building
Scarsdale, NY 10583
(914) 723-7699

DANIEL G. DONOVAN
175 Main Street
White Plains, NY 10601
(914) 946-3700

HENRY J. SMITH
175 Main Street
White Plains, NY 10601
(914) 946-3700

*Counsel for Appellees:*

*City of Mount Vernon*
*Town of Eastchester*
*Town of Mamaroneck*
*Town of Scarsdale*
*Town of Mount Pleasant*
*Village of Scarsdale*

33pp

## QUESTIONS PRESENTED

1. Whether special franchise property constitutes a valid separate classification under the Real Property Tax Law of the State of New York and whether such distinction between special franchise property and ordinary real property is legislatively permissible in the taxing structure.

2. Whether the use of the State Equalization rate which is made legally applicable to some 30 different State and municipal functions deprives the appellant of equal protection of the laws or due process of law when applied to special franchise assessments.

## TABLE OF CONTENTS


Relief Requested ..... 1

Preliminary Statement ..... 1

ARGUMENT:

POINT I—The classification of special franchise property as distinguished from other real property is rationally related to the achievement of a valid legislative state purpose ..... 2

A. The Determinations of the Court Below are Founded on the Long Involved History of Special Franchise Taxation ..... 5

B. The Real Property Tax Law Definitions of Real Property Show the Special Classification for Utilities and Special Franchises ..... 5

POINT II—The use of equalization rates to determine value is not limited to real property assessment ..... 11

POINT III—Appellant's due process argument grounded in retroactivity is without merit ..... 12

A. Procedural statutes may be applied to pending proceedings ..... 12

B. Retroactive application of a procedural statute is valid when no prior judgment is affected ..... 16

Summary Comment on Authorities Under This Point 22

Conclusion ..... 24


## Table of Authorities

*Cases Cited:*


*Allied Stores v. Bowers,* 358 U.S. 522 ..... 2, 7

*Matter of Berkowitz v. Arbib & Houlberg,* 230 N.Y. 261 (1921) ..... 13

*Matter of Brooklyn Union Gas Co. v. City of New York,* 56 N.Y.2d 881, 453 N.Y.S.2d 398, 438 N.E.2d 1113 .... 10

*Bucho Holding Co. v. State Rent Commission*, 11 N.Y.2d 469, 230 N.Y.S.2d 977, 184 N.E.2d 569 ..... 12

*Matter of Canigiani v. Board of Assessors of Nassau County*, 98 A.D.2d 233 (2d Dep't. 1983), 471 N.Y.S.2d 951 ..... 17, 18

*Matter of Chrysler Properties v. Morris*, 23 N.Y.2d 515, 297 N.Y.S.2d 723, 245 N.E.2d 395 (1969) ..... 14

*Colonial Pipe Line Company v. SBEA*, 81 Misc.2d 696, 366 N.Y.S.2d 949, *aff'd* 51 A.D.2d 793, 380 N.Y.S.2d 64 (2d Dep't. 1976), *aff'd* 41 N.Y.2d 1057, 396 N.Y.S.2d 184, 364 N.E.2d 848 ..... 7

*Matter of Colt Industries v. Finance Administrator N.Y. City*, 54 N.Y.2d 533 (1982), 446 N.Y.S.2d 237, 430 N.E.2d 1290 ..... 16

*Matter of Consolidated Edison Co. v. State Board of Equalization and Assessment*, 53 N.Y.2d 975 (1981), 441 N.Y.S.2d 669, 424 N.E.2d 556 ..... 14

*Matter of 200 Country Club Associates v. Board of Assessors of Nassau County*, 83 A.D.2d 637, 441 N.Y.S. 2d 705 (2d Dep't 1981) ..... 19, 20

*Matter of Equitable Life Assurance Society of the U.S. v. Finance Administrator N.Y. City*, 54 N.Y.2d 533, 446 N.Y.S.2d 237, 430 N.E.2d 1290 (1982) ..... 16

*860 Executive Towers v. Assessor, County of Nassau*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't. 1976) ..... 4

*Matter of Grumman Corp. v. Board of Assessors*, 2 N.Y.2d 500, 161 N.Y.S.2d 393, 141 N.E.2d 794 ..... 7

*Guth v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E. 441 (1974) ..... 4

*Matter of Hartley Holding Corp. v. Gabel*, 13 N.Y.2d 306, 240 N.Y.S.2d 976, 191 N.E.2d 457 ..... 11

*Hellerstein v. Assessor, Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 382 N.E.2d 279 ..... 7

*Lazarus v. Metropolitan Elevated Ry. Co.*, 145 N.Y. 581, 40 N.E. 240 (1895) ..... 13

*Long Island Lighting Co. v. State Tax Commission*, 45 N.Y.2d 529, 410 N.Y.S.2d 561, 382 N.E.2d 1337 ..... 7, 12

*Madden v. Kennedy*, 309 U.S. 83 ..... 7

*Metropolitan Street Railway Co. v. State Board of Equalization & Assessment*, 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd* 199 U.S. 1 (1905) ..... 2, 5, 10

*Mt. Kisco v. SBEA*, 64 N.Y.2d 950, 488 N.Y.S.2d 640, 477 N.E.2d 1094 (1985) ..... 11

*New York Telephone Co. v. Canough*, 264 A.D. 937, 36 N.Y.S.2d 263, *aff'd* 290 N.Y. 537, 49 N.E. 999 ..... 6

*Application of New York Telephone Co. v. Ferris*, 257 A.D. 415, 13 N.Y.S.2d 359, *aff'd* 282 N.Y. 667, 26 N.E.2d 805 ..... 6

*Matter of O'Brien v. Assessor, Town of Mamaroneck*, 20 N.Y.2d 587, 285 N.Y.S.2d 843, 232 N.E.2d 844 ..... 4

*Paramino Lumber Co. v. Marshall*, 309 US. 370 (1940) 14

*Matter of Pierre Pellaton Apts. v. Board of Assessors, County of Nassau*, 43 N.Y.2d 769, 401 N.Y.S.2d 1013, 572 N.E. 801 (1977) ..... 4

*Quotron Systems, Inc. v. Irizarry*, 48 N.Y.2d 795, 423 N.Y.S.2d 923, 399 N.E.2d 953 ..... 6

*Matter of River House-Bronxville v. Gallaway*, 100 A.D.2d 970, 475 N.Y.S.2d 291 (2d Dep't. 1984) ..... 19

*Matter of River House-Bronxville v. Hoffman*, 101 Misc. 2d 422, 421 N.Y.S.2d 161 (Sup. Ct. Westchester Cty., 1979), rev. 79 A.D.2d 990, 434 N.Y.S.2d 465 ..... 19, 20

*Shandaken v. SBEA*, 63 N.Y.2d 442, 483 N.Y.S.2d 161, 472 N.E.2d 989 ..... 10

*Simonson v. International Bank*, 14 N.Y.2d 281, 251 N.Y.S.2d 433, 200 N.E.2d 427 (1964) ..... 13

*Matter of Slewett & Farber v. Board of Assessors of Nassau County*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dep't. 1981), *modified* 54 N.Y. 547, 446 N.Y.S.2d 241 (1982) ..... 13, 16, 17, 18, 20

*Matter of Town of Smithtown v. Moore*, 11 N.Y.2d 238, 228 N.Y.S.2d 657, 183 N.E. 66 (1962) ..... 2, 3, 11

*Matter of South Bay Development Corp. v. Board of Assessors of Nassau County*, 108 A.D.2d 493, 489 N.Y.S.2d 762 (2d Dep't. 1985) ..... 21

*In the Matter of Staten Island Edison Corp. v. Moore*, 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dep't. 1958); *on remand* 37 Misc.2d 198, 238 N.Y.S.2d 443 (Sup. Ct., Albany Cty., 1961); *aff'd* 15 A.D.2d 983, 225 N.Y.S.2d 846 (3d Dep't. 1962), *aff'd* 12 N.Y.2d 846, 236 N.Y.S.2d 624, 187 N.E.2d 475 (1962) ..... 5

*Trump v. Chu*, 65 N.Y.2d 20, 489 N.Y.S.2d 455, 478 N.E.2d 971, app. dism. ____ U.S. ____, 88 L.Ed.2d 250 ..... 2, 7

*Matter of Wolf v. Assessors of Town of Hanover*, 308 N.Y. 416, 126 N.E.2d 537 (1985)..... 4

*Yaras v. Kinnaw*, 303 N.Y. 224, 101 N.E.2d 474 ..... 4

*Statutes Cited:*

N.Y.S. Real Property Tax Law ..... 2, 5

Section 102(3) ..... 6

Section 102(12) ..... 6

Section 102(12)(a)..... 6

Section 102(12)(b) ..... 6

Section 102(12)(c)..... 6

Section 102(12)(d) ..... 6

Section 102(12)(f) ..... 6

Section 102(17) ..... 6

Section 300 ..... 7, 8

Section 302 ..... 9
Section 305 ..... 7, 8
Section 306 ..... 7, 8
Section 581 ..... 20, 21, 22
Section 606 ..... 8, 9, 10, 15
Section 716 ..... 10
Section 720 ..... 4, 15, 16
Section 720(3) ..... 17, 18, 19, 22
Section 744 ..... 13, 14, 22, 23
Section 744(1) ..... 13, 15, 16, 22
Section 1202 ..... 15
Title 2 Article 7 ..... 10

Senate of the State of New York:

§2703 (1953) ..... 3
§3228 (1953) ..... 3
§3227 (1953) ..... 3
INT 2557 (1953) ..... 3

Real Property Law

Section 339-y ..... 19

*Other Authorities:*

Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) 14

No. 85-2057

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Appellant,*

*against*

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## MOTION TO DISMISS OR AFFIRM

### Relief Requested

This Court should dismiss the appeal on the ground that it does not present a substantial federal question. Alternatively, this Court should affirm for the reasons stated by the courts below.

### Preliminary Statement

As this brief is begun, we have received a draft of a brief on behalf of State Board of Equalization and Assessment ("State Board"). We find the counter statement of the case entirely sufficient for our purpose and we have no disagreement with the arguments made in that brief.

We are also generally aware of the positions taken by New York City and the other municipalities and, based on long familiarity with these proceedings, believe that we are in substantial agreement with those arguments.

# ARGUMENT

## POINT I

**The classification of special franchise property as distinguished from other real property is rationally related to the achievement of a valid legislative state purpose.**

It is well established that in the field of taxation, the Legislature is "not required to resort to close distinction or to maintain a precise scientific uniformity with reference to composition, use or value" (*Allied Stores v. Bowers*, 358 U.S. 522, 527; *Trump v. Chu*, 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 478 N.E.2d 971 (1985), app. dismissed ____ U.S. ____ 88 L.Ed.2d 250.

The trial court held that petitioner was unable to demonstrate that there was no rational basis for the classification, and also held that there was no basis for the argument that no differences existed that would justify differential treatment (JS A-17, 18). In fact, the court enumerated the numerous differences between special franchise property and normal real property set forth in the Real Property Tax Law (JS A-18).

The history of development of special franchise assessment shows clearly the creation of a special class, based on the creation of a new type of real property with unique characteristics. *Metropolitan Street Railway Co. v. State Board of Equalization & Assessment*, 174 N.Y. 417, 67 N.E. 69 (1903), aff'd 199 U.S. 1 (1905).

By 1949, the government of the State of New York came to the conclusion that remedial measures were necessary to cure the weaknesses in the existing assessment scheme. Two major areas presented themselves; (1) special franchises; (2) equalization. In 1949, a special temporary commission was created to be concerned with the application of equalization rates. See *Matter of Town of Smithtown v. Moore*, 11 N.Y.2d 238, 228 N.Y.S.2d 657, 183 N.E. 66 (1962).

By 1953, a number of measures had been introduced into the Senate of the State of New York, namely, § 2703, § 3228, § 3227 and INT 2557. Among the legislative documents dealing with these measures is the memorandum with respect to INT 2557. In this comment the writer clearly delineates the classification of special franchise property (Legislative Jacket).

> "1. Special franchise property continues as a special class of real property. For more than fifty years it has been treated as a special class of property and it has been assessed differently than other real estate. It is the only class of privately owned property located in public places which is legally recognized, and it is the only type of real estate which includes an intangible element, namely, the right to occupy a public place."

The memorandum of the then Attorney General of the State of New York accompanying the proposed legislation stated with respect to the proposed measures:

> "The essential provision of the bill as to assessment of special franchises is contained in Section 45 and is to the effect that such assessment shall be fixed by the Tax Commission annually and the latest equalization rates applied thereto, with the exception that any portion of the special franchise property which was assessed for the year 1953 shall thereafter have applied to it the 1953 state equalization rates. The bill deletes the requirements of 'full' valuation and equalization in assessment of such property."

The same law which created the new system of assessment of special franchises also promulgated new provisions for the determination of state equalization rates. In the years that followed the 1953 enactments, state equalization rates were attacked in a few cases (see *Smithtown, supra*), but there was no attack on the special franchise provisions. The statement of then Attorney General Goldstein that the assessment of

special franchises is not equalized with other property was effective and was carried out. An end came to the numerous actions of utilities litigating the special franchise assessments under the laws existing up to the 1953 amendment. From that time until 1974 there was practically no litigation with respect to special franchise assessments.

The equalization remedies did not follow quite the same route. Efforts were made to provide that the state equalization rates could be used for the purpose of determining the equalization factor in the litigation of ordinary real property assessments. Because of the newness of the equalization procedure, the lack of training, and the lack of well-developed discipline, the courts were unwilling to accept the state equalization rate as the factor to be applied under Section 720 of the Real Property Tax Law (RPTL) for the purpose of determining the proper equalization rate in an assessment proceeding. Thus, in *Yaras v. Kinnaw*, 303 N.Y. 224, 101 N.E.2d 474, and *Matter of Wolf v. Assessors of Town of Hanover*, 308 N.Y. 416, 126 N.E.2d 537, and in *Matter of O'Brien v. Assessor, Town of Mamaroneck*, 20 N.Y.2d 587, 285 N.Y.S.2d 843, 232 N.E.2d 844, the New York Court of Appeals rejected the state equalization rates as a single device to determine the rate to be applied in normal real property assessment litigation, mainly because the state had not established the basis for their reliability.

It was not until *Guth v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E. 441 (1974) that respectability came to the state equalization rates. By this time the State Board had developed procedures and techniques for measuring in each locality the relationship of assessed value to full value of the property. In *Guth* and in *860 Executive Towers v. Assessor, County of Nassau*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't., 1976), *aff'd sub nom. Matter of Pierre Pellaton Apts. v. Board of Assessors, County of Nassau*, 43 N.Y.2d 769, 401 N.Y.S.2d 1013, 572 N.E. 801 (1977), the courts pointed to the standards that had been developed by the State Board and that this was the most efficient and effective method of providing equalization rates. (34 N.Y.2d 440, 450).

### A. The Determinations of the Court Below are Founded on the Long Involved History of Special Franchise Taxation.

The first special franchise tax act was passed by the New York Legislature in 1899. For half a century thereafter the implementation of this law was a thorn in the sides of the assessors, administrators and the courts. Initially, the problems revolved about the legality and constitutionality of the legislation, namely, was this the taxing of personal property or real property; then it turned to the question of the application of the equalization rate during the time when substantially all assessments in the State of New York were made on a fractional basis. In this period the special franchise assessment was made by the Tax Commission of the State of New York and the equalization rates were determined by each municipality up to 1911 on the basis of the relationship of assessments to full value. From 1911 on the equalization process for special franchises only was carved out by the State Board or the State Tax Commission. The problems involved are sketched as of the beginning of the period in *Metropolitan Street Railway, supra,* and as of the end of the period in the *Staten Island Edison* cases.*

### B. The Real Property Tax Law Definitions of Real Property Show the Special Classification for Utilities and Special Franchises.

Appellant's argument that there may not properly be any difference between the treatment of special franchise property and normal real property (JS 10) is specious in view of the numerous distinctions between these two types of property as set forth in the Real Property Tax Law,**

---

* *In the Matter of Staten Island Edison Corp. v. Moore,* 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dep't., 1958); *on remand* 37 Misc.2d 198, 238 N.Y.S.2d 443 (Sup. Ct., Albany Cty., 1961); *aff'd* 15 A.D.2d 983, 225 N.Y.S.2d 846 (3d Dep't., 1962), *aff'd* 12 N.Y.2d 846, 236 N.Y.S. 624, 187 N.E.2d 475 (1962).

** hereinafter referred to as "RPTL."

and as delineated in the decision of Special Term below (JS A-18).

Subdivision 12 of Section 102 of the Real Property Tax Law defines real property. Aside from the normal definitions of land and buildings (Section 102(12)(a) and Section 102(12) (b), the remainder of the section is concerned with the definition of utility property (Section 102(12)(c), (d), (3) and (f)) and special franchise property (Section 102(12)(d) and Section 102(17).

The definitions set forth in Section 102 reflect the concept that utilities are so substantially different from the normal industrial company that they are assessed on a different basis. Thus, telephone and telegraph lines, wires, poles and appurtenances are taxable as real estate, even to the extent of including the telephone instrument located in the user's office (*New York Telephone Co. v. Canough*, 264 A.D. 937, 36 N.Y.S.2d 263, aff'd 290 N.Y. 537, 49 N.E. 999). So, also, with respect to electrical central office equipment (*Application of New York Telephone Co. v. Ferris*, 257 A.D. 415, 13 N.Y.S.2d 359, *aff'd* 282 N.Y. 667, 26 N.E.2d 805). On the other hand, telephone lines used by a non-utility company are not taxable as real estate. *Quotron Systems, Inc. v. Irizarry*, 48 N.Y.2d 795, 423 N.Y.S.2d 923, 399 N.E.2d 953.

Obviously, public utilities cannot exist without crossing streets and their lines do not terminate at municipal or even state borders. Those facilities used on streets were considered personal property prior to the enactment of the special franchise law in 1899. That law did not change the property from personal property to real property. What it did was to hold that the special franchise rights constituted real property and that their value is measured by the value of the physical equipment plus an intangible element.

Over the span of commercial development of electric power, gas, telephones and railroads, a complete body of law has developed treating these situations as utility property. Such properties, for reasons not germane to the discussions here, have certain rights, privileges and liabilities not available to other

types of companies. Their separate classification for purposes of real property assessment has been an accomplished fact for at least three quarters of a century.

In including the classification of special franchises as real property, it is to be noted that RPTL, Section 300, provides that all real property shall be subject to real property taxation and that personal property, tangible or intangible, shall not be subject to *ad valorem* valuation.

It is fundamental that the Legislature may classify property for tax purposes in any manner it deems proper, and it is immaterial if such classification works even a flagrant unevenness. *Allied Stores v. Bowers,* 358 U.S. 522, 527; *Madden v. Kennedy,* 309 U.S. 83, 88; *Long Island Lighting Co. v. State Tax Commission,* 45 N.Y.2d 529, 535, 410 N.Y.S.2d 561, 382 N.E.2d 1337; *Trump v. Chu,* 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 478 N.E.2d 971, app. dism. ____ U.S. ____, 88 L.Ed.2d 250; see *Matter of Grumman Corp. v. Board of Assessors,* 2 N.Y.2d 500, 507; 161 N.Y.S.2d 393, 141 N.E.2d 794.

The nature of a special franchise has been clearly defined in *Colonial Pipe Line Company v. SBEA,* 81 Misc.2d 696, 366 N.Y.S.2d 949, *aff'd* 51 A.D.2d 793, 380 N.Y.S.2d 64 (2d Dep't., 1976), *aff'd* 41 N.Y.2d 1057, 396 N.Y.S.2d 184, 364 N.E.2d 848, as "permanent occupation of public property" (81 Misc.2d 696, 699). Examination of the legislative history and the cases shows definitively that special franchise property has always been a class *sui generis*; its definition as real estate stems from the relationship of the special franchise property to taxable property, prior to the enactment of special franchise legislation.

Not only is special franchise property itself generically diffferent from all other real estate, but the intents of taxation are different in almost every respect:

(a) The method of valuation: special franchise property has been assessed since 1953 on a fractional basis; normal real property pursuant to Section 306 was assessed on a full value basis up to 1981 and since that time on a fractional or full value basis (RPTL Sec. 305). See *Hellerstein v. Assessor, Town of Islip,* 37 N.Y.2d 1, 371 N.Y.S.2d 388, 382 N.E.2d 279.

Up to the year 1983, RPTL 606 Par. 1 commenced with "notwithstanding the provisions of Section 306 of this chapter . . . " After the repeal of Section 306 and the promulgation of Section 305 setting forth various standards for assessments, the quoted words were deleted. (Subd. 1 L. 1983, c599, Section 5.) In 1984, to accommodate the provisions of Section 305 and Section 306, the quoted words were replaced, so that paragraph 1 of Section 606 now reads "notwithstanding the provisions of Section 305 of this chapter . . . " (Subd. 1. L. 1984, c473, Section 16.)

Contrary to the assertions of appellants that Section 305, Section 306 and Section 606 direct that special franchise property be taxed on the same basis as other real property (JS 11) is the fact that Section 305 prescribes different standards of assessments, one of which is full value and one of which is fractional value. However, the principle that has been maintained in the Real Property Tax Law is continued in the provisions of Section 606 that the assessments of special franchise property are to be made in a manner notwithstanding the provisions of Section 305. In ordinary English, "notwithstanding" means "different from," or "in spite of" (Webster).

(b) Since the assessment of usual real property is made at full value or at fractional value, that assessment does not reflect an equalization rate. However, pursuant to RPTL, Section 606, in assessing special franchises SBEA must apply the latest state equalization rate to the full value it has found.

(c) The equalization rate applied to special franchise property is not a single rate as is the case with respect to the judicial determination of equalization of ordinary property, but consists of two rates:

(1) For property existing in 1953 the equalization rate of that year; and

(ii) For property subsequently installed, the latest state equalization rate.

(d) Special franchise property has added to its value a factor for the intangible element, generally around 5%. The addition of such a value to normal real estate could result in the tax being invalid.

(e) Special franchise property generally belongs to utilities, which are monopolies in each area in which they operate. Consequently, there is no other property to be compared with utility property. The valuation of individual homes, and the application of an equalization rate applied thereto, to a mass of highly technical sophisticated machinery which is never bought or sold would produce a ridiculous result.

(f) RPTL Section 302 provides for the taxable status date of real property. Paragraphs one and two provide for the taxable status date of real property in cities, towns, villages and schools; paragraph three provides that exempt property acquired by a nonexempt person becomes taxable as of the date of sale. Paragraph four of Section 302 relates to special franchises only and commences with the same language as that used in Section 606; namely, "notwithstanding any other provisions of law." This section provides for a valuation date for special franchise property different from those used for normal property and for cities, towns, villages and schools. It was in the light of these provisions that the Supreme Court of the State of New York in this matter (Lowery, J., 120 Misc.2d 617, 621 (JS-A18)) held that the evidence was

> insufficient to demonstrate that Con Ed is denied equal protection of the law.

(g) The date for valuation of property is different in the case of special franchises and normal property. Special franchise property is valued on the basis of an inventory existing at December 31st prior to the year in which the assessment is made and at values which go back one year earlier. (RPTL Section 302(4)) Normal property is valued *at* the tax status date in the particular community and its value is determined as of that particular date. (RPTL Section 302 (1, 2, 3)) It follows as a consequence that the application of equalization rates based on values later than the valuation date will produce disparate results. Because of the anomalies and contradictions that existed and could exist, the Legislature provided in RPTL, Section 606, for the application of the latest state equalization rate.

(h) Special franchise taxpayers have a right to a refund for other franchise fees paid by them. Nowhere is there any similar provision with respect to ordinary real estate. See *Matter of Brooklyn Union Gas Co. v. City of New York,* 56 N.Y.2d 881, 453 N.Y.S.2d 398, 438 N.E.2d 1113.

(i) All normal real estate is assessed by the local assessors. Special franchise property is assessed by the State. The reason for this is shown in *People ex rel. Metropolitan Street Railway v. Tax Commissioner,* 174 N.Y. 417, 438, on the principle that the property was so complex (even in 1899) as to require special franchise faculties to determine its value.

(j) The time for filing a petition to review is 60 days in the case of special franchises as against 30 days in the case of normal real estate.

(k) There is no provision in the case of special franchises for the petitioner to serve upon the respondent a demand for admission of the equalization rate. In fact, Section 716 which provides for this procedure with respect to ordinary real estate excepts special franchise assessments from that arrangement. This means that the legislature either wanted to deprive the petitioner of the right to agree upon an equalization rate in special franchise proceedings, or, as is more likely, indicated that there was no question to be raised because of the provisions of § 606 and the remaining provision of Title 2 of Article 7.

There is no basis for appellant's contention that all property, special franchise and ordinary, is to bear the same equalization rate despite differences in date of valuation, date of ownership and years involved, and differences in the nature of the property. As stated by the New York Court of Appeals in *Shandaken v. SBEA,* 63 N.Y.2d 442, 447, 483 N.Y.S.2d 161, 472 N.E.2d 989, the legislature has the authority to invest in the State Board the authority to determine valuation as well as to assure conformity with the equalization rule.

## POINT II

### The use of equalization rates to determine value is not limited to real property assessment.

The State Equalization Rate is not a single specific taxing factor. It is applied to about 30 vitally important governmental purposes. (*Matter of Smithtown v. Moore,* 11 N.Y.2d 238, 243, 228 N.Y.S.2d 657, 183 N.E.2d 66)

Among these function are state aid, borrowing power of municipalities, allocation of taxes between municipalities, determination of full value for county assessments, and rent control. These rates primarily affect municipalities and because of the varied uses, a beneficial rate for taxing may be disadvantageous from the viewpoint of borrowing power. See *Mt. Kisco v. SBEA,* 64 N.Y.2d 950, 488 N.Y.S.2d, 640, 477 N.E.2d 1094 (1985).

In cases involving the determination of value for the purpose of rent control, the courts have sustained the application of an equalization rate which produced different values in different places and not the current rate. The relevance of these cases to an assessment situation is that in both cases the court is concerned with a determination of value. In the case of rent control, the determination of value dictates how much an owner of real property may earn on his investment; in the case of taxation, the impact on the owner is smaller, the question being how much he has to pay in the way of taxes.

In *Matter of Hartley Holding Corp. v. Gabel,* 13 N.Y.2d 306, 240 N.Y.S.2d 976, 191 N.E.2d 457, the court upheld New York City rent control laws where the rental was based upon "value." "Value" was defined as value in effect at the time the application is filed. At the same time, the state rent control laws were not based upon assessed value but "equalized" assessment values, using an equalization rate ten years old. It was appellant's unsuccessful argument in that case that there was constitutional infringement when it could not use a valuation based on the assessed value of its property as equalized and adjusted upward to or toward "actual" value.

In *Bucho Holding Co. v. State Rent Commission*, 11 N.Y.2d 469, 230 N.Y.S.2d 977, 184 N.E.2d 569, the court upheld the constitutionality of the state rent control law where the value for rent control purposes was the equalized assessed valuation of the property. The Court dealt with the fact that from 1957 to 1961, equalization rates of 1954 were employed in computing the value of property for rent control. Beginning in July 1961, however, new legislation was applied which discontinued the use of the 1954 rate and provided that assessed value be adjusted by the "most recent" equalization rate available.

It is noteworthy that the "most recent equalization rate" available enacted by the Legislature in 1961 is almost the same term as that used in Section 606 of the Real Property Tax Law which provides for the use of the latest equalization rate.

In the rent control cases, just as in this case, opponents of the legislation argued unsuccessfully that the use of the latest state equalization rate would be unconstitutional, would violate due process of law and would constitute a denial of equal protection of the law. The courts in the rent control cases, as shown above, have held that the use of an earlier equalization rate instead of the current rate did not make the statute unconstitutional despite the disparities in values.

These cases show clearly that where there is an appropriate basis for classification, resultant disparities do not invade the constitutional guarantees of due process and equal protection and that in the areas of taxation the legislature possesses the greatest freedom in classification. *Matter of Long Island Lighting Co. v. State Tax Commission*, 45 N.Y.2d 529.

## POINT III

### Appellant's due process argument grounded in retroactivity is without merit.

#### A. Procedural statutes may be applied to pending proceedings.

The general proposition is clear that statutes establishing or changing procedure, rather than substantive law, can properly be applied to regulate the conduct of actions and proceedings

pending at the time of their enactment. The first, or usual question as to coverage of such a statute is whether the legislative intention is made clear to apply the provisions to pending cases (if so, perfectly legitimate in principle), or whether the provisions are to be limited to the regulation of *future* litigation. *Simonson v. International Bank,* 14 N.Y.2d 281, 289, 251 N.Y.S.2d 433, 200 N.E.2d 427 (1964); *Matter of Berkowitz v. Arbib & Houlberg,* 230 N.Y. 261, 270 (1921); *Lazarus v. Metropolitan Elevated Ry. Co.,* 145 N.Y. 581, 585, 40 N.E. 240 (1895); 4 N.Y. Jur. 2d 501 §400 (1980).

The opinion of Justice Lazer for the "plurality" of the Second Department in *Matter of Slewett & Farber v. Board of Assessors of Nassau County,* 80 A.D.2d 186, 199-201, 213, 214 (2d Dep't 1981), *mod.,* 54 N.Y.2d 547 (1982), contains a succinct and well-documented discussion of retroactivity in general and procedural statutes in particular. Retroactivity generally is discussed at 80 A.D.2d 199-201; pages 212-213 cover the normality of a legislature's retroactive amendment of procedural statutes; and pages 213-214 set forth some special due process considerations with respect to the latter.

RPTL §744 as a whole is plainly a procedural statute. §744(1) in particular is no less plainly procedural, and the 1982 amendment to §744(1) is of the same, appropriate character. The general subject matter of §744 refers to "action by the court" in reviewing special franchise proceedings, and sections 2-5 are akin; subdivision 2 covers pleadings and objections to them; subdivision 3, appeals and stays; subdivision 4, appointment and use of extraordinary terms of the Supreme Court to hear cases; and subdivision 5, the effect of a new or corrected assessment by the court.

Subdivision 1 of §744 concerns the court's taking evidence on review of a special franchise assessment or appointing a referee to take evidence and determine the proceeding. Before the 1982 amendment, the rest of subdivision 1 concerned, and still concerns changing the place of trial to the county where the special franchise is located. Since July of 1982, the second sentence of 744(1) has stated: "Notwithstanding any provisions

of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue." The characterization of the amendment and the entire section as procedural seems entirely justified.

Further, the legislation limiting, controlling or defining the only evidence of ratio to be permitted in any case alleging defective ratio used for a special franchise assessment is obviously corrective, or curative legislation (263). This is recognized by all as the legislative effort to change the interpretation of permissible procedure reflected in the decision of this Court in *Matter of Consolidated Edison Co. v. State Board of Equalization and Assessment,* 53 N.Y.2d 975, 441 N.Y.S.2d 669, 424 N.E.2d 556 (1981), upholding the refusal of the Appellate Division to grant summary judgment against Con Edison to the extent that Con Edison proposed to prove a different ratio entirely by massive proof of sales to make a case of inequality in each jurisdiction at issue.

Curative statutes which undo or attempt to undo what a legislature perceives as a mistaken application of statutory law are a separate, self-sufficient category of proper retroactive application. They are treated at some length in a much-cited law review article on the main subject: Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harvard Law Review 692, 703-6, 721-2 (1960). Again, even while Judge Keating argued strongly for the majority against validation of retroactive application in *Matter of Chyrsler Properties v. Morris,* 23 N.Y.2d 515, 297 N.Y.S.2d 723, 245 N.E.2d 395 (1969), he was careful to cite the leading case of *Paramino Lumber Co. v. Marshall,* 309 U.S. 370 (1940), as to the recognized right of a legislature to "cure an obvious defect in its legislation" (23 N.Y.2d at 520).

The object of the Legislature to cover the provisions which needed correction in order to limit the new evidentiary provisions on proof of ratio to special franchise cases alone—i.e.,

carrying out the State Board's routine establishment everywhere of equalization rates for all the multitude of purposes under RPTL §1202, and the *mandatory* use of such state rates with the "full values" found for special franchise assessment under RPTL §606—is clear from the avoidance of any linkage with the much-amended RPTL §720 for Article 7 trials or evidentiary purposes generally. Here we see enactment of an amendment of the section on special franchises alone, i.e., RPTL §744, by way of §744(1).

We do not criticize anyone's reference to the standard of "vested rights" to signify something of which a party cannot properly be deprived by retroactive legislation. This is a perfectly good concept and description for due process purposes, or for marking the point where legislative action runs the risk of arrogating the function of the judicial branch. We do not minimize, either, the idea of studying the importance of public and private interests at stake in any intended application of new statutory law to pending cases. We see the real issue on this appeal, however, as being whether the Legislature is to be regarded as improperly interfering with the judicial function in making §744(1) applicable to pending (pre-1982) Con Edison proceedings after the 1980-81 denial of an order for summary judgment.

This issue, in addition to the fatal characterization (inapplicable here) of "procedural" legislative action as a disguised substantive enactment, or a deprivation of *all* judicial remedies to a litigant, is well covered in the analytical, plurality opinion of Justice Lazer in the *Slewett & Farber* case (*supra* at 80 A.D.2d 218-22). The discussion, in the end, comes down to whether the Legislature has gone beyond its proper sphere and interfered with or encroached on the judicial function in changing the evidentiary provisions for proving claims of unequal assessment of special franchises. The real issue and the one recognized in *Slewett* is that there can be no retroactive application to a judgment. In this case, there was no final judgment, thereby disposing of the retroactivity argument.

**B. Retroactive application of a procedural statute is valid when no prior judgment is affected.**

New York authorities from 1981 to date involving the Real Property Tax law show that amendments of a procedural statute like RPTL §744(1) may properly be and will be applied to pending proceedings in which there has not been a prior judgment.

The next three cases discussed below, all decided by the Court of Appeals in 1982, were concerned, for our purposes, with the various changes to RPTL §720, as enacted in 1979 and 1981, with respect to proof of inequality in proceedings on assessments of ordinary real property. Two more cases on § 720 in the Second Department follow, showing the Second Department following the principles of the three main cases in 1983 and 1984 as to application of the procedural provisions. Two final cases in 1984 and 1985, also in the Second Department, show very well the clear-cut response to a legislative "correction" of a prior judicial interpretation, with no substantial question of valid retroactively where no judgment has intervened.

The opinion of the Appellate Division, Third Department, which was adopted by the Court of Appeals disposes of the retroactivity arguments posed by appellant. In so doing, the court pointed out (JS A-11) that *Slewett & Farber v. Board of Assessors**, relied on by appellant (JS 10, 15) holds that retroactive legislation does not present a due process issue unless a final determination has been made by the judiciary. As the appellate court here found, no such final determination had been made in this case (JS A-11).

In *Matter of Colt Industries v. Finance Administrator N.Y. City* and *Matter of Equitable Life Assurance Society of the U.S. v. Same*, 54 N.Y.2d 533, 446 N.Y.S.2d 237, 430 N.E.2d 1290 (1982), decided the same day as *Slewett & Farber*, the Court of Appeals made clear how important the interlocutory judgment was in *Slewett & Farber*—thereby preventing even a procedural statute from being applied, *as interpreted*, to affect the result

* 80 A.D.2d 186, 199, 201, 438 N.Y.S.2d 544 (2d Dep't 1981), *modified* 54 N.Y. 547, 446 N.Y.S.2d 241 (1982).

where such an important judicial determination has intervened (54 N.Y.2d 543).

Here again the December 1981 amendment restricting proof of State rates was involved. The applicability of the 1981 version of §720(3) to the hearings to be held in the actions was firmly declared, on the basis of finding a clear-cut procedural statute applying to all proceedings pending on December 3, 1981. The right of the Legislature to subject all pending proceedings (i.e., all which did not have a fillip like the pre-existing, interlocutory judgment in *Slewett & Farber*) to a restriction of proof on issues of inequality is treated as absolutely clear and just about beyond argument. The *per curiam* opinion also took up and rather swiftly disposed of due process and equal protection arguments against forbidding proof of ratio by State equalization rates in New York City and Nassau County (54 N.Y.2d 543-45).

In *Matter of Canigiani v. Board of Assessors of Nassau County*, 98 A.D.2d 233, 471 N.Y.S.2d 951 (2d Dep't 1983), petitioner Canigiani obtained a ruling at Special Term, Nassau County, in April 1981 that the 1979 amendment to §720(3) was unconstitutional in preventing his use of the state rate to present an inequality case against his tax assessments, resulting in a decision of April 8, 1981, accepting the use of the State rates and reducing the assessments. After the decision of the Appellate Division in the *Slewett & Farber* case in April 1981 [upholding the facial validity of §720(3)], the *Canigiani* decision was vacated at Special Term but, at the same time, Canigiani was permitted to reopen his case for the purpose of proving the elimination of his "State rate" evidence to be unconstitutional under his theory that the proof of inequality by evidence of all sales in the area was illusory and would be unconstitutional as prohibitively expensive. In June 1981, Special Term held that the petitioner had demonstrated, in a trial, that the proof of an inequality case by the permitted evidence of sales would be prohibitively expensive. After further work on validation of the State rates as applicable to the premises, through the summer of 1981, Canigiani obtained a judgment on October 20, 1981, at Special Term holding that (a) Subsection 3 of §720 was unconstitutional insofar as it prohibited Canigiani's use of the

State rate; (b) the prior decision of April 8, 1981, was reinstated; (c) Canigiani's assessments for the tax years 1974/5 through 1980/1 were reduced.

The 1979 amendments, of course, expired on October 30, 1981, and the new statutory prohibition of the use of State rates in Nassau County and New York City took effect on December 3, 1981. After the Court of Appeals decision in *Slewett & Farber* on January 4, 1982 (*supra*, pp. 13-15), the appeal of the assessors in *Canigiani* came up in the Appellate Division. That court:

> 1. Did not address Special Term's invalidation of the 1979 version of §720(3), as predicated on the prohibitive expense of Canigiani's proof by "all sales";
>
> 2. Refused to rule on the validity of Special Term's reopening the case for trial of the constitutional issue of prohibitive expense;
>
> 3. Held that the old, 1979 version of §720(3), as an expired statute, had no application to the case as it stood now, i.e., after the Court of Appeals decision in *Slewett & Farber*;
>
> 4. Held that the new §720(3) of December 1981 had no application because, while it would ordinarily have applied to an action pending on December 3, 1981, it was inapplicable to the Canigiani case in that a prior, *final* judgment (now upheld as proper) of October 1981 was entered before the amendment was enacted.

Another certiorari petitioner named Raddock had also obtained an order for summary judgment on various theories of collateral estoppel based on invalidity of the restriction of proof of inequality by State rates. He had moved for summary judgment only in *May 1982*, however, and obtained his order for summary judgment in September 1982. With nothing of any more validity produced as to compliance with the 1981 amendments, this petitioner was fully covered by and had no

basis to ignore the prohibition of §720(3), as amended and effective on December 3, 1981. No prior judgment protected Raddock's position and, of course, he was in complete evasion of the applicable provisions of December 1981. His judgment of September 1982 was therefore reversed.

*Matter of River House-Bronxville v. Gallaway,* 100 A.D.2d 970, 475 N.Y.S.2d 291 (2d Dep't 1984) involved the application of procedural statutes to pending actions of several years' standing in *the absence of an intervening judgment.*

The case included two trials on the 1976-to-1978 tax assessments of a cooperative apartment building in Bronxville. On a prior trial before Justice Sullivan in Supreme Court, Westchester County, the court had considered the testimony of one expert under a "market" approach to valuation of a cooperative apartment (based roughly on the sum of the fair values of the various units for sale), as against an "income approach" of an opposing expert whereby the property was treated like a single, income-producing rental apartment house.

On the perception that Real Property Law §339-y and the case law at the time required only *condominiums* to be valued as if they made up a single rental apartment with an income stream, Justice Sullivan gave credence to the market valuation at a total price for all of the units of a cooperative, and dismissed the petitions. *Matter of River House-Bronxville v. Hoffman,* 101 Misc.2d 422, 421 N.Y.S.2d 161 (Sup. Ct. Westchester 1979), rev. 79 A.D.2d 990, 434 N.Y.S.2d 465. The Appellate Division agreed basically with Justice Sullivan and favored the use of market data in lieu of the income approach for the cooperatives. It also found no requirement of law to use only the income approach. It nevertheless reversed the judgment and directed a new trial for the purpose of developing evidence on certain "discount" factors thought to be applicable and also to find the limiting factor of "reproduction value less depreciation." 79 A.D.2d 990, 991 (1981); see also *Matter of 200 Country Club Associates v. Board of Assessors of Nassau County,* 83 A.D.2d 637, 441 N.Y.S.2d 705 (2d Dep't 1981), wherein the Appellate Division also upheld the market data approach for the valuation of cooperative apartments.

After the new hearings before Justice Sullivan in October 1981, but before his decision came down, the Legislature enacted Real Property Tax Law §581, effective December 3, 1981, requiring property owned or leased by a cooperative corporation to be assessed at no more than the value to be found if it were not owned or leased by a cooperative corporation or "on a condominium basis." There was no doubt whatever as to the legislative purpose in enacting the new RPTL §581. A memorandum of the S.B.E.A. to the Legislature in the bill jacket calls for an assessment not exceeding the sum that would have been stated in the absence of cooperative or condominium ownership. It is then said, in so many words, that the bill was "intended to reverse the trial court decision in *Matter of River House-Bronxville v. Gallaway*, 101 Misc.2d 422, and the Appellate Division (2d Dep't) holding in *Matter of 200 Country Club Associates*" (100 A.D.2d 973-4).

In determining the effect of the new statute, affecting his decision yet to be made, Justice Sullivan considered that there were no vested rights of the municipality in his 1979 determination because there was no *judgment* outstanding to prevent a new procedural statute from regulating the methodology to prove valuation of the subject property. Noting that valuation hearings were held after the Appellate Division reversal and before the enactment of §581, the controlling element was found by the trial court to be that no *judgment* was outstanding after the 1981 reversal, whereas the doctrine of the cases from *Slewett & Farber* through *Green* was that nothing less than an interlocutory judgment will prevent the introduction of changed procedural or evidentiary provisions, by passage of an original or amended statute, into a pending proceeding. The Appellate Division affirmed, adopting Justice Sullivan's rationale and many of his words (100 A.D.2d at 973).

It is readily apparent, of course, that nothing whatever is said in the reported case about judicial resistance toward the legislative disapproval of a statutory interpretation which underlies the new statute. Further, there is no surprise or resistance about applying a curative, procedural statute of December 1981 to the

trial procedures of tax proceedings of 1976 and thereafter, by way of judicial determinations of July 1982 at Special Term and April 1984 in the Appellate Division.

*Matter of South Bay Development Corp. v. Board of Assessors of Nassau County*, 108 A.D.2d 493, 489 N.Y.S.2d 762 (2d Dep't 1985), involved South Bay's certiorari case before Justice Farley for reduction of 1980 and 1981 assessments, mainly as to its 61-unit condominium apartments. Hearings were held in mid-1983—not only after the December 1981 enactment of RPTL §581 but between the decision of Justice Sullivan in the retried *River House* case and the affirmance by the Second Department discussed just above. The petitioner's expert relied on the income approach, for tactical purposes and under the stated procedure for condominium properties per §581, but Nassau County contested the income approach by way of market valuation under a sophisticated "discounted gross sellout" theory. Here Nassau's expert avoided the mere totaling of the gross sales prices established for the separate apartments and applied various discounting factors to bring the value below the maximum of possible valuation under RCNLD.

In a decision which was not incorporated into a judgment until August 1983 (by then the second Appellate Division decision in *River House* had come down), Justice Farley agreed with Justice Sullivan's subjection of the recently taken proof to the December 1981 requirements of §581—i.e., a retrospective following of the legislative intent to subject pending proceedings to the "income-only" requirement of §581 for condominiums and cooperatives. The trial court specifically rejected the argument that §581 created a new assessment standard only for *prospective* application, holding that the legislative objective of currently correcting, or curing other interpretations as to the proper proof to establish valuation was clear. He therefore applied §581, accepted the "income" appraisal of the petitioner's expert and reduced the assessments.

On appeal, Nassau County advanced arguments in support of the "discounted gross sellout" appraisals as consistent not

only with prior law but with the requirements of §581. This is discussed at some length and rejected in the decision for affirmance, but the part of the case of interest to us is the court's disposition of the final appellate argument that, if §581 prohibits the "discounted sellout" approach, the statutory prohibition of December 3, 1981, must be regarded as prospective only, so that it is not to be applied to certiorari proceedings brought or assessments made before the December 1981 date (108 A.D.2d 501).

The Appellate Division showed not the slightest disposition to retreat from its *River House* principle that "nothing short of an interlocutory determination" would have vested the respondent's rights as against such an evidentiary (procedural) statute as §581 (108 A.D.2d 508) whereas the South Bay trial did not begin until October 1982—nearly a year after the enactment of the statute. Against the articulation of South Bay's "discounted sellout" approach as a matter of "vested substantial legal rights," and not merely a choice of evidentiary routes to be followed which the Legislature might freely and properly "tinker with" thereafter, the Court had no hesitation in adhering to its second *River House* decision on retroactive application of §581 to tax proceedings pending on December 3, 1981 (even where a trial *precedes* the December 1981 date), without a preexisting decision and judgment. Here, of course, there was no part of a trial before the amendment of 1981 and the respondent was described as making the claim "in the very teeth" of the existing statute (108 A.D.2d 509).

**Summary Comment on Authorities under This Point**

Viewing together all the authorities under this heading, the demonstration of the cases seems clear: (a) the amendment of RPTL §744(1), no less than the 1979 and 1981 amendments of §720(3) and the 1981 enactment of RPTL §581, is an enactment of a clear-cut procedural portion of a statute; (b) there is no substantive element in the amended §744(1) by its very nature; and nothing in the passage of the legislation (to correct and undo a prior interpretation of Article 7 and §744 as permitting

proof of alleged inequality of ratio in special franchise proceedings by sales or sample parcels) which changes the characterization of this part, or all parts of §744 as procedural; (c) as a statute well within the familiar power of the Legislature to correct a departure from the legislative scheme for litigation of special franchise cases, the amended §744(1) would surely have been construed as applying to our "pending proceedings" and not merely regulating the conduct of litigation in the future, but the express application to proceedings commenced after January 1, 1973, and "not finally determined" on the effective date of July 22, 1982 (Laws of 1982, Ch. 714, §29) makes construction unnecessary; (d) the normal application of such a procedural statute with respect to prior assessments and pending proceedings is that it applies to all such proceedings which are not exempt or disclaimed from governance, but that it stops short at the point where any such proceeding has reached the point of an interlocutory judgment. The latter principle also serves as the demarcation of the area into which the legislature does not and should not intrude—that of trying to override a court interpretation which has reached the point of judicial declaration of (at least) an interlocutory judgment. In other words, the legislature should and does stop short of the point of "legislative *reversal*" of a judicial determination.

Based on these considerations, the New York courts have held: that courts are obligated to recognize and apply retroactive modifications of the law involved in pending litigation; that such retroactive legislation does not present a due process issue unless a final determination has been made by the judiciary; and that in the instant case no such final determination had been made. (JS A-11; A-18-20)

These considerations are not only applicable under New York law for the reasons set forth herein, but are equally applicable under federal law.

It is our understanding that the other appellees have more fully briefed the federal due process and equal protection questions and we rely on the arguments made in those briefs.

## CONCLUSION

**The appeal should be dismissed or the order below should be affirmed.**

Dated: White Plains, New York
July 30, 1986

Respectfully submitted,

HENRY J. SMITH
*Attorney for Appellees*
*City of Mount Vernon, Towns of Eastchester, Mamaroneck, Mount Pleasant and Scarsdale and Village of Scarsdale*
175 Main Street
White Plains, NY 10601
(914) 946-3700

*Of Counsel:*

MARVIN S. FINK
DANIEL G. DONOVAN

Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2057

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
*Appellant,*

vs.

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,
*Appellees.*

---

**On Appeal from the Court of Appeals of the State of New York**

---

## MOTION TO DISMISS OR AFFIRM OF APPELLEES VILLAGE OF PLEASANTVILLE, ET. AL.

---

MICHAEL WHITEMAN
*Counsel of Record*
MELVIN H. OSTERMAN, JR.
JONATHAN P. NYE
WHITEMAN OSTERMAN & HANNA
*Attorneys for Appellees Village of Pleasantville, et al.*
One Commerce Plaza
Albany, New York 12260
(518) 449-7600

## QUESTIONS PRESENTED

1. Whether the assessment of special franchises of regulated public utilities separately and differently from other, conventional, real property denies the holders of such special franchises the equal protection of the laws?

2. Whether, contrary to *Bi-Metallic Investment Co.* v. *State Board*, 239 U.S. 441 (1915), a special franchise holder has in the course of a judicial review of the assessment of its special franchise a due process right to wage a collateral attack on the equalization rate used in computing that assessment?

3. Whether an appeal from a non-final order dismissing one aspect of consolidated proceedings to review real property tax assessments for multiple years is justiciable by this Court prior to disposition of all aspects of those proceedings for all years?

# TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT | 8 |
| I. This Appeal Does Not Present a Substantial Federal Question | 8 |
| A. The Assessment of Special Franchise Property as a Separate Class Has a Rational Basis and Does Not Deny Con Edison the Equal Protection of the Laws | 8 |
| B. Con Edison Has No Due Process Right to a Hearing on an Equal Protection Claim that Does Not Exist | 9 |
| C. Con Edison Had No Entitlement to Assert, in the Course of a Proceeding to Review its Assessments, that the State Board Did Not Follow its Statutory Mandate in Promulgating Equalization Rates | 11 |
| II. This Appeal is not Justiciable | 14 |
| A. The Proceedings Are Not Yet Final as a Matter of State Law | 15 |
| B. Adjudication of this Appeal May Lead to Fragmented Review of State Proceedings in this Court | 15 |
| C. Con Edison Does Not Have Standing to Bring its Claims Before this Court | 16 |
| CONCLUSION | 18 |
| APPENDIX | A-1 |

# TABLE OF AUTHORITIES


| | Page |
|---|---|
| CASES | |
| *Allen v. Wright*, 104 S.Ct. 3315 (1984) | 18 |
| *Bi-Metallic Investment Co. v. State Board* 239 U.S. 441 (1915) | 11, 12 |
| *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) | 9 |
| *Brooklyn Union Gas Co. v. State Board*, 65 N.Y.2d 472, 482 N.E.2d 77, 492 N.Y.S.2d 598 (1985), *cert. denied*, 106 S.Ct. 1461 (1986) | 17 |
| *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 45 N.Y.2d 706 (1978) | 2 |
| *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 64 N.Y. 754 (1984) | 15 |
| *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d (1986) | 3, 6, 10 |
| *Cincinnati, New Orleans & Texas Pacific R. Co. v. Kentucky*, 115 U.S. 321 (1885) | 9 |
| *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) | 16 |
| *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) | 15 |
| *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) | 15 |
| *Dreyer v. Illinois*, 187 U.S. 71 (1902) | 13 |
| *Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 332 N.E.2d 274, 371 N.Y.S.2d 388, *modified*, 39 N.Y.2d 920, 352 N.E.2d 593, 386 N.Y.S.2d 406 (1979) (superceded by statute) | 4 |
| *Huddleston v. Dwyer*, 322 U.S. 232 (1944) | 10 |
| *Londoner v. Denver*, 210 U.S. 373 (1908) | 11 |
| *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649 (1942) | 14 |
| *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981) | 14 |
| *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938) | 9 |
| *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) | 16 |

| | Page |
|---|---|
| *People ex. rel. Jamaica Water Supply Co. v. Tax Commissioners,* 196 N.Y. 39, 89 N.E. 581 (1909) ..... | 17 |
| *People ex. rel. Metropolitan Street Ry. v. State Board,* 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd,* 199 U.S. I (1905) ..... | 2 |
| *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379 (1953) ..... | 15 |
| *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62 (1948) ..... | 15, 16 |
| *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26 (1976) ..... | 18 |
| *Slewett & Farber v. Board of Assessors,* 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982) ..... | 16 |
| *United States v. The Schooner Peggy,* 5 U.S. [1 Cranch] 103 (1801) ..... | 10 |
| CONSTITUTIONAL PROVISIONS | |
| U.S. Const. art. III | 18 |
| U.S. Const. amend. XIV | 8 |
| N.Y. Const. art. VIII, §§4, 10. | 3 |
| STATUTES | |
| 28 U.S.C. §1257(2)(1982) | 14, 15 |
| N.Y. State Admin. Proc. Act §102 (McKinney 1984). | 12 |
| N.Y. State Admin. Proc. Act §205 (McKinney 1984). | 13 |
| N.Y. Agric. and Mkts. Law §305 (McKinney 1974 & Supp. 1986). | 3, 4 |
| N.Y. Civ. Prac. Law §217 (McKinney 1972) | 14 |
| N.Y. Civ. Prac. Law §5601 (McKinney 1984). | 15 |
| N.Y. Civ. Prac. Law §5602(b) (McKinney 1984). | 15 |
| N.Y. Civ. Prac. Law §7803 (McKinney 1981). | 14 |
| N.Y. Educ. Law §§3602, 3603 (McKinney 1981 & Supp. 1986). | 3 |
| N.Y. Real Prop. Tax Law §102(17) (McKinney 1984). | 2 |
| N.Y. Real Prop. Tax Law §480-a (McKinney 1984 & Supp. 1986). | 4 |
| N.Y. Real Prop. Tax Law §§489-e, 489-l, 489-ee, 489-jj (McKinney 1984 & Supp. 1986). | 3 |

| | Page |
|---|---|
| N.Y. Real Prop. Tax Law §606 (McKinney 1984 & Supp. 1986). | 3, passim |
| N.Y. Real Prop. Tax Law §700 (McKinney 1984). | 14 |
| N.Y. Real Prop. Tax Law §701 (McKinney 1984). | 2 |
| N.Y. Real Prop. Tax Law §712 (McKinney 1984). | 13 |
| N.Y. Real Prop. Tax Law §720 (McKinney 1984 & Supp. 1986). | 4 |
| N.Y. Real Prop. Tax Law §740(1) (McKinney 1984). | 4 |
| N.Y. Real Prop. Tax Law §744(1) (McKinney 1984). | 5, 8 |
| N.Y. Real Prop. Tax Law §1202 (McKinney 1984 & Supp. 1986). | 3 |
| N.Y. State Fin. Law §54 (McKinney 1974 & Supp. 1986). | 3 |
| OTHER SOURCES | |
| P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* (1973). | 10 |
| 3 K. Davis, *Administrative Law Treatise* (2d. ed. 1980). | 11 |

No. 85-2057

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
*Appellant,*

vs.

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,
*Appellees.*

---

**On Appeal from the Court of Appeals of the State of New York**

---

## MOTION TO DISMISS OR AFFIRM

---

Appellees the Towns of Greenburgh, Harrison, New Castle, Ossining and Yorktown, the Villages of Ardsley, Briarcliff Manor, Bronxville, Mount Kisco, Ossining, Pelham and Pleasantville and the City of Peekskill move pursuant to Rule 16 of the rules of this Court to dismiss or affirm on the ground that this appeal fails to present a substantial federal question and that the decision of the court below is so obviously correct as to warrant no further review, or in the alternative that this appeal is not justiciable.

## STATEMENT OF THE CASE

Beginning in 1975, appellant Consolidated Edison Co. of New York, Inc. ("Con Edison") instituted proceedings to review the assessments of its special franchises in various municipalities in the counties of Westchester and Rockland and in the City of New York.[1] In New York State, a special

[1] The 168 consolidated proceedings that form the basis of this appeal relate to petitions filed in the years 1975-1978, respecting tax years 1974-1977.

franchise is defined by section 102(17) of the New York Real Property Tax Law ("RPTL") as the right granted to a regulated utility to install and operate poles, pipes, wires and other equipment upon or under the public streets in the areas served by the utility.[2] The New York State Legislature first provided in 1899 for the taxation of this right as if it were real property, a practice the constitutionality of which is not questioned. *See People ex. rel. Metropolitan Street Ry. v. State Board,* 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd,* 199 U.S. 1 (1905).[3]

Con Edison's petitions challenged the assessments of its special franchises on three grounds: overvaluation, inequality and illegality (A-51).[4] Stated simply, a claim of overvaluation is an assertion that the assessment of a taxpayer's property is in excess of the full value of the property.[5] A proceeding based on inequality alleges that other similarly-classed property in the taxing district is assessed at a lesser proportion of full value than is the taxpayer's property.[6] A claim of illegality may be based upon certain other errors that may result in an improper assessment.[7]

Those portions of Con Edison's petitions alleging illegality of assessment have been dismissed by the New York courts.[8] A consolidated trial of the issue of overvaluation (covering not only the tax years 1974-1977, but also additional tax years up to and including the tax year 1985), commenced in 1983 and was

---

[2] N.Y. Real Prop. Tax Law §102(17) (McKinney 1984).

[3] The special procedures governing the assessment and taxation of these special franchises are contained in what is now article 6 of the New York State Real Property Tax Law (hereinafter referred to in text as the "RPTL"), as well as in portions of article 7 of that law.

[4] References to the Appendix to Con Edison's Jurisdictional Statement are cited as "(A-)." References to the Jurisdictional Statement are cited as "(JS-)."

[5] *See* N.Y. Real Prop. Tax Law §701(4) (McKinney 1984). The statute defines such an assessment as "excessive."

[6] *See* N.Y. Real Prop. Tax Law §701(8) (McKinney 1984).

[7] *See* N.Y. Real Prop. Tax Law §701(9) (McKinney 1984). Such an assessment is defined as "unlawful."

[8] *Consolidated Edison Co. of New York, Inc. v. State Board,* 45 N.Y.2d 706 (1978).

ongoing at the time Con Edison's Jurisdictional Statement was filed.[9] The inequality portions of the petitions have also been dismissed as a matter of law by the New York courts.[10] That dismissal is the subject of this appeal.

Unlike ordinary real property, the assessments of which are determined by local officials in each of the many taxing jurisdictions throughout New York State, special franchises—which often cross such jurisdictional lines—are centrally assessed by a state agency, the appellee State Board of Equalization and Assessment ("State Board").

As directed by RPTL §606, the State Board performs its assessing role by first determining the "full value" of each special franchise. The State Board is then required to apply to each such full value[11] the "latest state equalization rate," a rate previously and independently determined by the State Board, jurisdiction by jurisdiction, and used throughout the state for a wide variety of purposes, only one of which is the computation of assessments for special franchises.[12] The equalization rates

---

[9] Motions to dismiss those proceedings have been made to the trial court by the appellees. The proceedings relating to tax year 1974 alone were dismissed on Con Edison's own motion on July 10, 1986. The order of dismissal is included as an appendix to this brief.

[10] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986) (A-2). In addition to the order appealed from, which relates solely to the inequality portions of the petitions for the years 1974-1977, on July 10, 1986, the trial court dismissed as well the inequality portions of the petitions for the years 1978-1985. Con Edison has not yet appealed from that order, although presumably it will do so.

[11] A special rule, not relevant to this appeal, applies to property installed prior to 1953. *See* N.Y. Real Prop. Tax Law §606 (McKinney 1984 & Supp. 1986).

[12] The equalization rate is promulgated by the State Board pursuant to N.Y. Real Prop. Tax Law §1202 (McKinney 1984 & Supp. 1986). As noted, it is used throughout the state for a number of purposes, including but not limited to the calculation of municipal debt and tax limits, N.Y. Const. art. VIII, §§4, 10; apportionment of school aid, N.Y. Educ. Law §§3602, 3603 (McKinney 1981 & Supp. 1986); the establishment of partial exemptions for railroads from local real property taxation, N.Y. Real Prop. Tax Law §§489-e, 489-l, 489-ee, 489-jj (McKinney 1984 & Supp. 1986); apportionment of per capita state aid, N.Y. State Fin. Law §54 (McKinney 1974 & Supp. 1986); assessment of certain farm lands, N.Y. Agric. and Mkts. Law

*(footnote continues)*

measure the proportion of full value at which local assessors throughout the state have assessed real property within their respective jurisdictions.[13]

When these proceedings were commenced, the parties disagreed concerning the manner in which a special franchise assessment was, for purposes of a claim of inequality, to be subject to judicial review. RPTL §720, which prescribes the manner of review for ordinary realty, permits three kinds of proof to demonstrate that a given property has been assessed unequally with other property: the so-called "selected parcels" method,[14] comparison to actual sales within the jurisdiction,[15] and comparison to the state equalization rates.[16] The provision that governs review of special franchises provides, however, only that such review may be had "so far as practicable" in the manner provided for ordinary realty.[17]

Despite the explicit language of RPTL §606 that a special franchise assessment is to be equalized by application of the latest state equalization rate, Con Edison urged that the Legislature's directive that the review provisions for ordinary realty contained in section 720 should be utilized "so far as practicable" in the review of special franchise assessments indicated the Legislature's intent to equalize special franchises in precisely the same manner as ordinary realty. Con Edison insisted that a review of a special franchise assessment must therefore encompass a determination of the "accuracy" of the applicable

---

*(footnote continued)*

§305 (McKinney 1974 & Supp. 1986); and computation of real property tax limits on certain privately held forest lands, N.Y. Real Prop. Tax Law §480-a (McKinney 1984 & Supp. 1986).

[13] Throughout the years relevant to this appeal, local assessors were required by statute to assess ordinary real property at full value. *See Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975), *modified*, 39 N.Y.2d 920, 352 N.E.2d 593, 386 N.Y.S.2d 406 (1976) (superceded by statute). In contrast, special franchises have always been required to be assessed at the fraction of their full value represented by the equalization rate. N.Y. Real Prop. Tax Law §606 (McKinney 1984 & Supp. 1986).

[14] N.Y. Real Prop. Tax Law §720(3) (McKinney Supp. 1986).

[15] N.Y. Real Prop. Tax Law §720(3)(a) (McKinney Supp. 1986).

[16] N.Y. Real Prop. Tax Law §720(3)(b) (McKinney Supp. 1986).

[17] N.Y. Real Prop. Tax Law §740(1) (McKinney 1984).

state equalization rate previously determined by the State Board.

The State Board and other appellees to this proceeding opposed this interpretation and moved for partial summary judgment, urging that RPTL §606—which mandates the equalization of special franchise assessements by the latest state equalization rate and not by some other number—demonstrated the Legislature's intent that special franchises be assessed equally with respect to one another, but not necessarily with respect to other differently classed property. The State Board's motion was granted by the trial court,[18] which was reversed by the appellate division upon a conclusion by that court "that it was not the Legislature's intent" to foreclose a collateral attack on the equalization rates in the course of a proceeding to review a special franchise assessment.[19] That determination was upheld, without opinion, by a divided New York Court of Appeals.[20]

Following this ruling, but before any trial or other proceedings were commenced, the Legislature amended[21] RPTL §744(1), to ensure that the procedural rule of RPTL §740 was interpreted consistently with the substantive directive of RPTL §606. As amended, section 744(1) provides in pertinent part:

> Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue.

N.Y. Real Prop. Tax Law §744(1) (McKinney 1984).

---

[18] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 98 Misc. 2d 491, 413 N.Y.S.2d 1012 (Sup. Ct. 1979) (A-113).

[19] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 73 A.D.2d 31, 35, 425 N.Y.S.2d 651, 654 (1980) (A-105, 109).

[20] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 53 N.Y.2d 975, 424 N.E.2d 556, 441 N.Y.S.2d 669 (1981) (A-103).

[21] N.Y. L. 1982 ch. 714 §24.

The Legislature thus made manifest that, in accordance with section 606, equality of assessment for special franchises must obtain only among special franchise properties themselves, not necessarily between special franchises and ordinary realty.[22]

Based on this legislation, the State Board and other appellees again moved for partial summary judgment (A-32); Con Edison cross-moved for a declaration that the legislation was unconstitutional, both facially and as applied (A-39). The constitutionality of the legislation was upheld by the trial court,[23] by a unanimous appellate division[24] and by a unanimous New York Court of Appeals.[25] The opinion adopted by that court explained:

> When this matter was last before this court, the issue was whether, as a matter of statutory interpretation, a special franchise holder could contest the equalization rates. As a result of the amendment which is the subject of this appeal, that issue is now settled: a special franchise holder is precluded from judicially contesting the equalization rates.

(A-8). Con Edison then filed a notice of appeal to this Court (A-28).

---

[22] The New York courts recognized in this case that, as a matter of policy, the Legislature intended special franchises to be assessed at a ratio equal to that applied to other property. The courts also recognized, however, that the Legislature had determined that the best means of effectuating this policy was by strict reliance on the state equalization rates (A-9).

[23] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 120 Misc. 2d 617, 466 N.Y.S.2d 575 (Sup. Ct. 1983) (A-25).

[24] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 103 A.D.2d 453, 480 N.Y.S.2d 789 (1984) (A-5, 9).

[25] *Consolidated Edison Co. of N.Y., Inc. v. State Board*, 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986) (A-2).

## SUMMARY OF ARGUMENT

In this appeal, Con Edison argues that equalization of its special franchise assessments by use of the state equalization rates, which it claims may result in assessments of its special franchises at a different proportion of value than those of ordinary real property, violates its right to the equal protection of the laws. Con Edison further argues that the absence of a hearing on this purported issue deprives Con Edison of due process of law.

In the alternative, Con Edison asserts that interim decisions in these proceedings in the New York courts concerning issues of statutory interpretation somehow bestowed on Con Edison's rights that the New York Legislature and courts were powerless to change.

Finally, Con Edison asserts that in the course of a proceeding to review its assessments, it must have a right to review the "accuracy" of administrative action of state-wide application taken long before in an entirely separate proceeding.

As will be demonstrated, special franchise property has been identified and taxed by the New York Legislature as a separate class of property for nearly one hundred years, and neither the fact of that classification nor the possibility that proportionally different assessments may result from it creates any constitutional infirmity. Furthermore, since the "accuracy" of the equalization rate is not an issue in a proceeding to review a special franchise assessment, either as a matter of New York law or constitutional requirement, the absence of a hearing on that issue cannot deprive Con Edison of anything.

As will be further demonstrated, the underlying premise of the earlier decisions of the New York courts in these proceedings has since been corrected by the legislature and the courts of New York, and that correction must, in accordance with long-standing decisions of this Court, be applied to these proceedings.

Finally, it will be demonstrated that Con Edison has no standing in these proceedings to argue that the State Board failed to follow its statutory mandate in establishing the equalization rates for the state, and indeed has no standing in this Court on any issue at all.

## ARGUMENT

### I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

#### A. The Assessment of Special Franchise Property as a Separate Class Has a Rational Basis and Does Not Deny Con Edison the Equal Protection of the Laws.

Con Edison asserts that RPTL §744(1) denies it the equal protection of the laws in contravention of the fourteenth amendment to the Constitution by permitting its property to be assessed at a higher percentage of full value than that of other "similarly situated" taxpayers (JS-10-11). Con Edison's argument is based upon its erroneous premise that "[i]n this case, the state courts have ruled definitively that the state statutes created only one class of real property for tax purposes during the years here in question" (JS-11).

None of the authorities cited by Con Edison even remotely supports this proposition. Indeed, the opinion adopted by the New York Court of Appeals, from which this appeal is taken, demonstrates exactly the contrary:

> Central to petitioner's constitutional arguments is its premise that a special franchise holder has a constitutional right to be assessed at a ratio equal to that being applied to other property holders. We find no support for this proposition. It is clear that special franchise property is of a different nature than other real property *and the Legislature, by creating separate articles dealing with the assessment procedures for special franchises and real property generally, has recognized this distinction.*

(A-9) (emphasis supplied).

Thus, contrary to Con Edison's assertions, the New York Legislature has declared and the New York courts have recognized that special franchises *are* a separate class of property as a matter of state law. Accordingly, the only federal question respecting this issue is whether New York may for purposes of real property taxation constitutionally differentiate

between ordinary realty and special franchises, an issue not advanced by Con Edison and, in any event, long ago settled by this Court. *See New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573 (1938), *aff'g* 275 N.Y. 258, 9 N.E.2d 858 (1937); *Cincinnati, New Orleans & Texas Pacific R. Co. v. Kentucky,* 115 U.S. 321 (1885).

**B. Con Edison Has No Due Process Right to a Hearing on an Equal Protection Claim That Does Not Exist.**

Building on the erroneous premise that special franchise property is exactly like ordinary real property, Con Edison argues that RPTL §744(1) deprives it of due process of law by eliminating a hearing on its claim that differential treatment of its special franchises denies it the equal protection of the laws. Because Con Edison has no such claim, however, the absence of a hearing on it logically cannot deprive Con Edison of anything.

Con Edison's apparent reliance on *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), is misplaced. Unlike the instant case, *Brinkerhoff* concerned the denial of the opportunity to be heard on a taxpayer's unquestioned right to be treated equally with other taxpayers with similarly classed property. Con Edison has been heard in the New York courts on the question of the class of property to which its special franchises must be equalized, however, and Con Edison has lost. Under New York law, as construed by the New York Court of Appeals, public utilities, including Con Edison, have no right to assessment of their special franchises on the same basis as ordinary realty. Taxation of special franchises as a separate class is thus statutorily mandated and, as demonstrated above, constitutionally permissible. Accordingly, the denial of a hearing on the question whether Con Edison's special franchises were treated equally with ordinary real property does not result in any deprivation of property without due process of law.

Similarly unavailing is Con Edison's argument (JS-14-16) that the evidentiary rule of RPTL §744(1) deprives it of due process of law by eliminating "the only evidence that could possibly have proved the claim, thereby destroying the claim

itself" (JS-4). The claim to which Con Edison argues it was entitled, presumably, was the right to challenge the accuracy of the state equalization rates. As the New York courts have now recognized, however, the accuracy of those rates is not an issue in an inequality proceeding involving special franchises. Accordingly, the elimination of evidence relative to that issue can be of no consequence:

> Contrary to petitioner's contention, this court's decision did not give petitioner a cause of action for a refund of taxes, nor did it establish that petitioner had a viable claim for a refund of taxes. This court simply held that, in the context of its cause of action for inequality, petitioner had a right to contest the equalization rates, *as a matter of statutory interpretation.* There had not yet been any determination that the equalization rates were inaccurate, no less a determination that petitioner was entitled to a refund. Thus, the statutory amendment did not deprive petitioner of any cause of action or substantive right granted to it by this court.

*Consolidated Edison Co. of N.Y., Inc. v. State Board,* 103 A.D.2d 453, 459, 480 N.Y.S.2d 789, 793-94 (1984), *aff'd,* 67 N.Y.2d 783, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986) (A-11) (emphasis in original).

The New York courts have definitively interpreted the Real Property Tax Law as withholding any substantive right of inter-class equalization from special franchise taxpayers. Con Edison is thus relegated to an argument that such an interpretation may not constitutionally be applied to these proceedings. That such an argument must fail was settled, however, during the time of Chief Justice Marshall, and the rule then articulated—that courts must apply the law in existence at the time of decision—has been adhered to ever since. *See United States v. The Schooner Peggy,* 5 U.S. [1 Cranch] 103 (1801); *Huddleston v. Dwyer,* 322 U.S. 232 (1944); P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System,* 316 n.4 (1973).

### C. Con Edison Had No Entitlement to Assert, in the Course of a Proceeding to Review its Assessment, that the State Board Did Not Follow its Statutory Mandate in Promulgating Equalization Rates.

Con Edison asserts in the alternative that, even if the Constitution permitted New York State to equalize special franchise assessments by use of the state equalization rates, Con Edison has been denied a hearing on its claim that the State Board "failed to adhere to statutory standards" in the promulgation of those rates. This argument is answered squarely by *Bi-Metallic Investment Co. v. State Board,* 239 U.S. 441 (1915), in which the Court elucidated the distinction between equalization and valuation and articulated the differing procedural requirements attendant upon each.

The Court held in *Bi-Metallic* that no hearing is constitutionally required in connection with the establishment of an equalization rate that is to be applied across-the-board to all members of a particular class. The Court distinguished *Londoner v. Denver,* 210 U.S. 373 (1908), relied upon by Con Edison, as concerning a wholly different issue: the right of every taxpayer to be heard on the issue of the *value* of its property,[26] a right dependent not on any statutory formulation but rather on the principle that government may not adjudicate particular facts about a party without giving that party an opportunity to be heard on those facts. *See* 3 K. Davis, *Administrative Law Treatise,* §15:9 (2d. ed. 1980).

As Justice Holmes explained:

> [In *Londoner*] [a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

---

[26] A right Con Edison is currently pursuing at the trial level. See pp. 2-3 *supra.*

*Bi-Metallic Investment Co. v. State Board* 239 U.S. 441, 446 (1915). By contrast,

> [w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power.

239 U.S. at 445.

Consistent with these principles, New York law defines the establishment of an equalization rate as a legislative or rule-making rather than as an adjudicatory function.[27] Moreover, in New York, an equalization rate cannot conceivably be related to particular facts about a utility such as Con Edison because special franchise properties, which are not assessed by local assessors, form no part of the class of properties examined by the State Board for purposes of establishing the state equalization rates.

Con Edison's seeming assertion that it has standing to object that "the State Board legislated the amount of taxes payable by special franchise owners, a power which was not, and could not be, granted to it" (JS-17) raises entirely differ-

---

[27] Section 102(2)(a)(ii) of the State Administrative Procedure Act defines a "rule" as including "the amendment, suspension, repeal, approval, or prescription for the future of rates, wages . . . or practices bearing on any of the foregoing whether of general or particular applicability." N.Y. State Admin. Proc. Act §102 (McKinney 1984). In this case, the establishment of the equalization rates as a rulemaking function of the State Board was noted by the New York courts (A-21).

ent, albeit equally invalid, arguments. The first of these, that the State Board is "without power" to legislate, is a matter purely of state law, has been decided adversely to Con Edison (A-10), and raises no federal question. *See Dreyer v. Illinois,* 187 U.S. 71, 84 (1902).

The second, which is equivalent to a contention that Con Edison is, within the terms of *Bi-Metallic*, "exceptionally affected on individual grounds," 239 U.S. at 446, is an argument Con Edison may not now raise in this Court. Given the requisite standing (a showing Con Edison has neither made nor attempted to make), Con Edison may seek judicial review of the extent to which the State Board has performed its responsibility, pursuant to RPTL §1202, to ascertain equalization rates throughout the state.[28] Such review must be sought, however, not in the course of a review of an assessment, but as a challenge to the allegedly improper administrative action—in this case the State Board's establishment of the equalization rates. The time to bring such a proceeding is at the time at which a challenged equalization rate is established, not well after that rate has been promulgated and has been used for a multitude of other purposes.[29] The procedures for challenging administrative action in New York, and for seeking judicial review thereof, are amply set forth in the State Administrative Procedure Act[30] and in the New York Civil Practice Law and

---

[28] Con Edison's Jurisdictional Statement is replete with accusations that the State Board "illegally, intentionally and systematically" manipulated Con Edison's assessments "for political and other reasons" (JS-6, 16, 17), none of which charges, Con Edison says, "has ever [been] denied" by appellees. To the extent that Con Edison has set forth in its petitions its perceptions of the motivations of the State Board, all such allegations are by statute deemed denied by the State Board and have been explicitly denied by the remaining appellees. *See* N.Y. Real Prop. Tax Law §712 (McKinney 1984).

[29] *See* n. 12 *supra.*

[30] N.Y. Admin Proc. Act §205 (McKinney 1984) provides for judicial review of administrative rulemaking either through a petition for a declaratory ruling or pursuant to article 78 of the New York Civil Practice Law and Rules. *See* n. 31 infra.

[31] Article 78 of the New York Civil Practice Law and Rules provides for special proceedings to review whether a body or officer of the state "failed to

*(footnote continues)*

Rules.[31] These procedures were simply never pursued by Con Edison, which cannot now complain that it did not enjoy rights it never sought to enforce.

## II. THIS APPEAL IS NOT JUSTICIABLE.

Con Edison has the burden of establishing jurisdiction in this Court. *Memphis Natural Gas Co. v. Beeler,* 315 U.S. 649 (1942). The policy of avoiding premature adjudication of constitutional issues, moreover, demands that any doubts concerning the existence of jurisdiction be resolved against its exercise. *Minnick v. California Department of Corrections,* 452 U.S. 105, 120 (1981).

Con Edison seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. 1257(2)(1982), which provides for review in this Court of "final" state court judgments. As will be demonstrated, the 168 consolidated proceedings that are the basis of this appeal are, collectively, not final in any sense, and Con Edison's belated attempt to achieve finality with respect to a small number of its consolidated claims[32] only rendered those claims moot.

---

*(footnote continued)*

perform a duty enjoined upon it by law." N.Y. Civ. Prac. Law §7803 (McKinney 1984). Such a proceeding must be commenced within four months from the time of the determination to be reviewed. N.Y. Civ. Prac. Law §217 (McKinney 1984).

The New York courts in this case concluded that the trial court did not err in refusing to convert Con Edison's petitions to review its assessments into an article 78 proceeding, holding that Con Edison had no "viable claim to litigate" in such a proceeding (A-12). Because Con Edison has sought in these proceedings to *review its assessments,* that result was proper, in that article 7 of the RPTL provides the exclusive remedy for such review. N.Y. Real Prop. Tax law §700 (McKinney 1984). A timely article 78 proceeding that sought to review only the State Board's establishment of the equalization rates, however, would not be barred by the exclusivity provisions of article 7. As noted, Con Edison has never instituted such a proceeding.

[32] Con Edison stated in its Jurisdictional Statement that "for the year 1974, Appellant has relinquished its claim based on overvaluation" (JS-2 n.2). At the time when Con Edison's Jurisdictional Statement was filed with this Court on June 12, 1986, that statement was not accurate. Con Edison's 1974 overvaluation claims were not "relinquished" until July 10, 1986, when the trial court before which Con Edison's consolidated claims are now pending, dismissed, on Con Edison's own motion, the 1974 petitions and severed those petitions from the remaining claims. The trial court's order is included as an appendix to this motion.

**A. The Proceedings Are Not Yet Final as a Matter of State Law.**

The order appealed from in this case relates to 168 proceedings respecting the tax years 1974-1977 (JS-3). When Con Edison initially sought to appeal that order as of right to the New York Court of Appeals, its appeal was dismissed by that court because, as a matter of New York law, the order was not final. *Consolidated Edison Co. of N.Y., Inc. v. State Board,* 64 N.Y.2d 754 (1984). *See* N.Y. Civil Prac. Law §5601 (McKinney 1984). Con Edison ultimately obtained review by the New York Court of Appeals by permission on a certified question of law, a procedure available only with respect to non-final orders (A-2). *See* N.Y. Civil Prac. Law §5602(b) (McKinney 1984).

Although finality under state law is not absolutely determinative of jurisdiction under 28 U.S.C. §1257, the Court has departed from strict adherence to the rule of finality only when there are compelling reasons for doing so. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 (1949). Con Edison has presented no reason for the Court to depart from the requirement of finality other than the simple assertion that "the federal issue . . . will require decision regardless of the outcome of future state-court proceedings" (JS-2 n.2). Not only is that statement demonstrably incorrect, the policies underlying the finality requirement strongly counsel against the exercise of the Court's jurisdiction.

**B. Adjudication of this Appeal May Lead to Fragmented Review of State Proceedings in this Court.**

Foremost among the considerations that have guided the Court in its determination whether a particular state court judgment is "final" within the meaning of 28 U.S.C. §1257(2) is the avoidance of piecemeal or fragmented review. *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379 (1953). This consideration is especially pertinent when, as here, a constitutional challenge is directed toward a state court decision on a matter primarily of local concern. *Republic Natural Gas Co.*

*v. Oklahoma,* 334 U.S. 62 (1948). Con Edison's severance of a relatively small number of its consolidated claims simply leaves 141 of the 168 proceedings included in this appeal pending at the trial level,[33] along with the proceedings for additional years with which they have been consolidated. Moreover, those claims concern issues of valuation: issues "inherently provocative of constitutional claims." *Id.,* 72. Accordingly, Con Edison's last-minute severance of its 1974 claims[34] serves only to raise the possibility that, at some future time, the parties will once again be before this Court in these very proceedings.

### C. Con Edison Does Not Have Standing to Bring its Claims Before this Court.

State court decisions not yet fully final also do not warrant review in this Court because further state proceedings may well moot or render unnecessary any constitutional decision. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973). An examination of the 1974 claims, which Con Edison has purportedly rendered final, will illustrate this consideration.

In New York, a claim of inequality of assessment requires that a taxpayer demonstrate both the value of its property and the proportion of that value that the taxpayer argues should be reflected in its assessment. *See Slewett & Farber v. Board of Assessors,* 54 N.Y.2d 547, 555, 430 N.E.2d 1294, 1296, 446 N.Y.S.2d 241, 243 (1982). In these proceedings, therefore, Con Edison must prove not only an "accurate" equalization rate but a full value to which that rate may be applied. Only then may a comparision to the original assessment be made in order to determine if a reduction of the assessment is warranted: for a given assessment, just as the equalization rate may vary, so may the value to which that rate is to be applied. Every assessment therefore may be produced by a multitude of combinations of value and rate.

---

[33] Con Edison's reliance on *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978) (JS-2 n. 2), is thus misplaced. In that case, appellant had relinquished *all* of its remaining state claims in order to secure expedited review in this Court.

[34] *See* n. 32 *supra.*

The trial court's recent decision to dismiss and sever Con Edison's 1974 petitions was predicated on the court's recognition both that Con Edison's challenge to the "accuracy" of the equalization rate had been dismissed and also that, respecting the valuation portion of its petitions, Con Edison had failed to overcome the presumptive correctness of the State Board's assessments.[35]

Significantly, *no values* for Con Edison's special franchises were found by the trial court. Indeed, it is impossible to determine from the court's order whether the value of Con Edison's property should be the value contained in the appraisal filed by the State Board,[36] the sum of the values in the appraisals filed by the intervenors to these proceedings, some combination of the foregoing, or such values as were part of the original State Board assessments (values that are nowhere presented in Con Edison's submission to this Court and which can, if at all, be determined only by extrapolation from the final assessments produced by the State Board). Even if those latter values were chosen by Con Edison to be the values against which new equalization rates were to be applied, that unilateral choice cannot be used to deprive appellees to these proceedings of the right to demonstrate different, higher values for Con Edison's special franchises. Accordingly, without having established values against which new equalization rates could be applied, Con Edison cannot yet demonstrate to this Court that the result it ultimately hopes to achieve—the calculation of new "accurate" equalization rates—would provide it any relief in terms of a reduction of its assessments.

---

[35] Under New York law, the duty of the courts is to ascertain whether the assessment and the methodology by which it was produced were "reasonable" or "correct." *See Brooklyn Union Gas Co. v. State Board,* 65 N.Y.2d 472, 485, 482 N.E.2d 77, 81, 492 N.Y.S.2d 598, 602, (1985), *cert. denied,* 106 S. Ct. 1461 (1986); *People ex. rel. Jamaica Water Supply Co. v. Tax Commissioners,* 196 N.Y. 39, 51, 189 N.E. 581 (1909).

[36] Among the recitals to the trial court's order is the acknowledgment that Con Edison consented "to accept" values for its special franchises found in the appraisals submitted to the court by the State Board. Those values are not included as part of the court's order, however, and Con Edison's mere acceptance of them has no legal significance.

That Con Edison demonstrate affirmatively that such relief would be forthcoming is an essential prerequisite to standing in this Court under article III of the Constitution. *See Allen v. Wright,* 104 S. Ct. 3315, 3325 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Thus, even if the Court were to conclude that the order appealed from is final for purposes of 28 U.S.C. §1257(2), the broader requirement of article III of the Constitution that Con Edison demonstrate that it has standing before this Court at this time would remain unsatisfied.[37]

## CONCLUSION

As appellant has failed to raise a substantial federal question, and the decision of the court below is so obviously correct as to warrant no further review, this Court should dismiss the appeal or affirm. In the alternative, the Court should decline jurisdiction over the appeal.

MICHAEL WHITEMAN
*Counsel of Record*
MELVIN H. OSTERMAN, JR.
JONATHAN P. NYE
WHITEMAN OSTERMAN & HANNA
*Attorneys for Appellees Village of Pleasantville, et al.*
One Commerce Plaza
Albany, New York 12260
(518) 449-7600

July 28, 1986

[37] Similarly, until determinations are made by the trial court concerning the remaining proceedings before this Court, *i.e.*, those relating to the years 1975-1977, Con Edison cannot yet make a showing that it will have standing with respect to any of those proceedings either.

# APPENDIX

ORDER OF THE SUPREME COURT

**At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the 10th day of July 1986.**

PRESENT:

HON. THOMAS J. LOWERY, JR.,
Acting Supreme Court Justice.

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

-against-

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et. al.,

*Respondents,*

VILLAGE OF PLEASANTVILLE, et al.,

*Intervenors-Respondents.*

**FINAL JUDGMENT**

**Index Nos.**

| | |
|---|---|
| 11747/74 | 1555/75 |
| 1556/75 | 1557/75 |
| 1558/75 | 1559/75 |
| 1560/75 | 1561/75 |
| 1562/75 | 1563/75 |
| 1564/75 | 1565/75 |
| 1566/75 | 1567/75 |
| 1568/75 | 1569/75 |
| 1570/75 | 1571/75 |
| 1572/75 | 1573/75 |
| 1574/75 | 1575/75 |
| 1576/75 | 1577/75 |
| 1578/75 | 3026/75 |
| 3027/75 | |

Petitioner, Consolidated Edison Company of New York, Inc., having brought the above-entitled proceedings to reduce the assessments on its special franchise property located in the City of New York and certain Westchester Municipalities in which it owns special franchise property for the 1974/75 tax year; and the issues in the proceedings having duly come on to be heard before the Honorable Thomas J. Lowery, Jr., Acting Supreme Court Justice at a Special Term of this Court, held at the State Office Building, 333 East Washington Street, Syracuse, New York; and

WHEREAS, the proceedings were consolidated with proceedings for tax years 1975/76 through 1977/78 by order of the Supreme Court; and

WHEREAS, the Court having ruled on September 24, 1983 granting the motion of the respondents and intervenors-

respondents granting them partial summary judgment against the petitioner dismissing the portions of the petitions seeking to establish that the assessments of petitioner's property were unequal in that the equalization rates used by the State Board of Equalization and Assessment ("SBEA") in determining the assessment did not represent the ratio between the assessed valuation and full valuation in the taxing units where petitioner's property was situated and further denying petitioner's cross-motion seeking to declare RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void; and said order having been affirmed by the Appellate Division Third Department and the Court of Appeals; and,

WHEREAS, petitioner has consented solely with respect to the above-entitled proceedings to accept as the full value of petitioner's property the values set forth in the appraisals of the SBEA submitted in evidence at trial for its "Frozen Base" and "Subsequent" property without admitting to the correctness of the SBEA's appraisals for other proceedings or years;

NOW, on motion of Rosenberg & Tulis, Special Counsel for petitioner, it is adjudged and decreed as follows:

1. The proceedings set forth above are hereby severed from the proceedings for tax year 1975/76 through 1977/78, and are separately consolidated for disposition.

2. RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, is declared constitutional and applicable to the within proceedings.

3. The assessments in question are hereby confirmed and the petitions dismissed, without costs.

Judgment signed this 10th day of July 1986.

.....

THOMAS J. LOWERY, JR.

Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2057

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

*Appellant,*

vs.

THE STATE BOARD OF EQUALIZATION
AND ASSESSMENT, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## APPELLANT'S REPLY BRIEF

MARTIN B. COWAN
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5090
*Attorney for Appellant*

*Of Counsel:*
ERNEST J. WILLIAMS
FREDERICK J. HUNZIKER, JR.
GARY SCHULLER
4 Irving Place
New York, New York 10003
(212) 460-3572

MARK S. TULIS
230 Park Avenue
New York, New York 10169
(212) 697-2371

August 21, 1986

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| I. JUSTICIABILITY | 2 |
| A. The Issue is Not Moot | 2 |
| B. The Order Dismissing the Twenty-Seven Proceedings for 1974 is Final | 2 |
| II. THE FEDERAL QUESTION IS SUBSTANTIAL | 4 |
| A. There is Only One Class of Property in New York | 5 |
| B. Regardless of the Number of Classes, Taxpayers Have a Right to a Hearing | 7 |
| 1. *Bi-Metallic did not deny taxpayers a hearing on inequality of assessment* | 7 |
| 2. *The equalization rate is not a "legislative fact"* | 8 |
| 3. *"Legislative facts" are not immune from judicial review* | 9 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| CASES: | |
| *Bi-Metallic Investment Co. v. State Board*, 239 U.S. 441 (1915) | 7, 8, 9 |
| *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930) | 6, 7, 10 |
| *City of Mount Vernon v. State Board*, 44 N.Y.2d 960, 408 N.Y.S.2d 323, 380 N.E.2d 155 (1978) | 5 |
| *Commissioner v. Sunnen*, 333 U.S. 591 (1948) | 4 |
| *Department of Banking v. Pink*, 317 U.S. 264 (1942) | 3 |
| *Hellerstein v. Assessor, Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 274 (1975) | 6 |
| *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946) | 6, 7 |
| *Jamaica Water Supply Co. v. State Board*, 196 N.Y. 39, 89 N.E. 581 (1909) | 6, 7 |
| *Lakeland Water District v. Onondaga Water Authority*, 24 N.Y.2d 400, 301 N.Y.S.2d 1, 248 N.E.2d 855 (1969) | 2 |
| *Londoner v. Denver*, 210 U.S. 373 (1908) | 8 |
| *Metropolitan Street Railway v. State Board*, 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd*, 199 U.S. 1 (1905) | 5 |
| *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984) | 8 |

| | Page |
|---|---|
| *Nashville C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933) | 2 |
| *People ex rel. Hilton v. Fahrenkopf*, 279 N.Y. 49, 17 N.E.2d 765 (1938) | 4 |
| *Richardson v. Ramirez*, 418 U.S. 24 (1974) | 2 |
| *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) | 7 |
| *Slewett & Farber v. Board of Assessors, County of Nassau*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dept. 1981), *modified*, 54 N.Y.2d 547, 446 N.Y.S.2d 241, 430 N.E.2d 1294 (1982) | 2 |
| *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973) | 8 |
| **CONSTITUTIONAL PROVISIONS:** | |
| United States Constitution, Fourteenth Amendment | *passim* |
| **STATUTORY PROVISIONS:** | |
| 28 U.S.C. §1257(2) | 2, 3 |
| New York Laws 1911, ch. 804 | 6 |
| New York Civil Practice Law and Rules, §103 | 2 |
| New York Civil Practice Law and Rules, §3001 | 2 |
| New York Civil Practice Law and Rules, §3017(a) | 2 |
| New York Real Property Tax Law, §102(12)(h) | 6 |

| | Page |
|---|---|
| New York Real Property Tax Law, §102(17) | 6 |
| New York Real Property Tax Law, §306 (repealed) | 5 |
| New York Real Property Tax Law, §606 | 5, 6 |
| New York Real Property Tax Law, §616(2) | 5, 6 |
| New York Real Property Tax Law, §1202(1)(a) | 6 |
| **MISCELLANEOUS:** | |
| Davis, Administrative Law §12.2 (1978) | 8 |
| Davis, Administrative Law §12.3 (1978) | 9, 10 |
| Davis, Administrative Law §12.8 (1978) | 10 |
| Federal Rule of Evidence 201 (Notes of Advisory Committee) | 9, 10 |
| Koch, Administrative Law and Practice (1985) | 10 |

No. 85-2057

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

*Appellant,*

vs.

THE STATE BOARD OF EQUALIZATION
AND ASSESSMENT, et al.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## APPELLANT'S REPLY BRIEF

### INTRODUCTION

The present appeal is from an order of the Court of Appeals dated March 18, 1986, affirming the dismissal of appellant's motion for a declaratory judgment that RPTL §744(1) is unconstitutional. The decision below is final, relates to a genuine and immediate controversy among the parties, and presents substantial constitutional issues. This brief is submitted in opposition to the motions filed by the various appellees to dismiss or affirm.[1]

[1] Motion to Dismiss or Affirm of Appellee State Board of Equalization and Assessment ("SBEA Motion"); Motion to Dismiss or Affirm of Appellee City of New York ("NYC Motion"); Motion to Dismiss or Affirm of Appellees Village of Pleasantville, et al. ("Pleasantville Motion"); and Motion to Dismiss or Affirm of Appellees City of Mount Vernon, et al.

## I. JUSTICIABILITY

On June 9, 1986, appellant notified the trial court and opposing counsel in writing that it relinquished all remaining state law claims in the 27 proceedings for 1974, by accepting the highest appraisal values which appellees had placed in evidence for 1974. (See the appendix to this Brief at B-1.) Thereafter, the only matter left in issue in those 27 proceedings was the constitutionality of §744(1), and the case had the same status as an ordinary action for a declaratory judgment.[2]

### A. The Issue is Not Moot.

Appellees argue that the 1974 proceedings are moot because appellant may no longer be able to obtain a money judgment for that year. However, this contention ignores the status of the 1974 proceedings as an action for a declaratory judgment. A final declaratory judgment of a state's highest court is reviewable by this Court under 28 U.S.C. §1257(2), as long as there is a continuing genuine controversy affecting the rights of the litigants, even though no monetary damages could be awarded. E.g., *Nashville C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933); *Richardson v. Ramirez*, 418 U.S. 24, 35 (1974). There can be no doubt about the genuineness of the present controversy. It affects the vital interests of the litigants, immediately and substantially. It is certainly not moot.

### B. The Order Dismissing the Twenty-Seven Proceedings for 1974 is Final.

Appellees have raised a number of objections to appellant's appeal on the basis of finality:

---

[2] See N.Y. Civil Practice Law and Rules, 7B McKinney's Cons. Laws of New York, §§103, 3001, 3017(a) (one form of civil proceeding in New York; different forms are to be treated as interchangeable); *Lakeland Water District v. Onondaga Water Authority*, 24 N.Y.2d 400, 301 N.Y.S. 2d 1, 248 N.E.2d 855 (1969); *Slewett & Farber v. Board of Assessors, County of Nassau*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dept. 1981), *modified on other grounds*, 54 N.Y.2d 547, 446 N.Y.S.2d 241, 430 N.E.2d 1294 (1982).

(a) The Pleasantville Motion (at 14) claims that the appeal is defective because the relinquishment of the state law claims was not reflected in an order entered prior to June 16, 1986, when appellant filed the Jurisdictional Statement.

A judgment of a state court is deemed "final" within the meaning of 28 U.S.C. §1257(2) if it disposes of all substantive issues even though there remain to be completed various ministerial matters, such as entries of formal orders. *Department of Banking v. Pink*, 317 U.S. 264, 267-268 (1942). Here, the concession of the state law issues was made on June 9, 1986; that made the Court of Appeals order final. The ministerial need to enter appellant's concession as a judgment did not affect the finality of that Court of Appeals order affirming the dismissal.

(b) Appellees assert that the March 18, 1986 order of the Court of Appeals is not final because the prior New York Appellate Division order, on October 12, 1984, was not deemed final under New York procedure. SBEA Motion 8; Pleasantville Motion 15. This objection is irrelevant because it fails to recognize that, subsequent to the time the Court of Appeals considered the question of the finality of the Appellate Division's order, appellant conceded the valuation issue.

(c) Appellees also claim that appellant's concession for 1974 did not dispose of the valuation issue because they may still offer evidence of higher values. Pleasantville Motion 17. That is plainly wrong. All of the appellees participated at the trial in 1984, and the record for submission of valuation evidence for 1974 has long been closed. No party has any right to introduce new valuation evidence for 1974.

(d) Appellees attempt to confuse the issues by referring to as many as eleven years in controversy other than 1974. E.g., NYC Motion, 7-8, 12-13, 23-24. This appeal covers only the years 1974 through 1977.[3] Each year is a separate cause of action.

---

[3] As explained in footnote 2 on page 2 of appellant's Jurisdictional Statement ("J.S."), although the value of the property in the 1975-1977 years has not been

*(Footnote continued)*

*Commissioner v. Sunnen*, 333 U.S. 591 (1948); *People ex rel. Hilton v. Fahrenkopf*, 279 N.Y. 49, 17 N.E.2d 765 (1938). Nothing relating to any year after 1974 affects the finality of the 27 proceedings for 1974.*

Until the constitutionality of the state statute is determined by this Court, the same question will remain for subsequent years. If the mere continuation of a constitutional issue in subsequent years were sufficient to destroy finality, no continuing constitutional controversy could ever be heard by this Court.

To the contrary, the fact that the issue persists in every subsequent year demonstrates that the controversy herein is far from moot, that the Due Process claims of appellant will not evaporate, and that the issue should be resolved at the first opportunity.

## II. THE FEDERAL QUESTION IS SUBSTANTIAL

Appellees argue that there is no substantial federal question, primarily on the grounds that there are two classes of real property in New York and, therefore, there is no denial of Equal Protection.

This argument fails to address the specific conclusions in the opinion of the court below "that the Legislature has determined that special franchises are to be assessed at a ratio equal to that being applied to other real property. . .", that the legislative "policy [is one] of equal ratio assessment between special franchises and other real property. . ." and that its "objective [is] . . . equality and uniformity of taxation . . . ." A-9-10. It also fails to take into account that, even if there were two classes of property, appellant still has a Due Process right to a hearing on its claim that

---

conceded, those years are final, also. But even if those later years are not yet considered final by this Court, the 1974 proceedings alone are sufficient to vest jurisdiction in the Court.

* That the first four years were consolidated for purposes of trial does not change the fact that each year is a separate cause of action. In any event, the judgment entered by the trial court on July 10, 1986 severed 1974 from the subsequent years. See NYC Motion A-7.

the State Board intentionally and systematically ignored the applicable statutory standard in order to inflate the taxes on special franchises.[5]

**A. There is only one class of property in New York.**

Appellees argue that special franchise property is different from other real property because it is partly personal or intangible, and because different procedures are utilized in making the assessment. Appellees also refer to the difference in the language in former RPTL §306, which required assessments at "full value", and RPTL §606, which requires an equalized value.

Since 1899, when special franchises were first defined and taxed, special franchises have never been assessable at a rate of tax or at a percentage of value different from that used for other real property. Because special franchises cross many municipal boundaries and the entire system may be better valued as a unit, rather than piecemeal, the Legislature delegated to a central agency (now the State Board) the responsibility for valuing special franchises. But that difference in procedure was specifically intended to assure uniformity of assessments, not different levels of assessment. *Metropolitan Street Railway v. State Board*, 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd*, 199 U.S. 1 (1905).

Regardless of the different interim steps in reaching the assessment, the State Board acts merely as the "alter ego" for the local assessors, *City of Mount Vernon v. State Board*, 44 N.Y.2d 960, 408 N.Y.S.2d 323, 380 N.E.2d 155 (1978), and the final assessments are added to the rolls by those local assessors, "with the same force and effect" as any other assessment. RPTL §616(2). As a

---

[5] Although some appellees still claim that appellant had an opportunity to present its case administratively, (NYC Motion 12, 16-17; Pleasantville Motion 13-14), the State Board concedes that it does not allow administrative challenges by taxpayers. A-93. Nor was judicial review available in any alternative proceeding. The Appellate Division held that the "issue is now settled: a special franchise holder is precluded from judicially contesting the equalization rates." A-8.

result, the state courts have always recognized the right of special franchise property owners to maintain actions for equalization based on assessments of all other real property.

In *Jamaica Water Supply Co. v. State Board*, 196 N.Y. 39, 89 N.E. 581 (1909), it was held that the "same force and effect" language of §616(2) required that special franchises and other real property had to be assessed equally. However, as noted in that opinion, the State Board of Tax Commissioners did not then have the authority to equalize special franchise assessments, and it was necessary for a taxpayer to commence a judicial proceeding in order to obtain equality. The statutory provision cited by appellees (now in §606) was added in 1911 to permit equalization administratively (N.Y. Laws 1911, ch. 804), but this still did not create a separate classification, and special franchise owners still had the right to judicial review of the administrative actions. See cases cited at J.S. 11.

Appellees themselves admit (see A-81) that the §606 language was merely the legislative recognition that local assessors were not in fact assessing at full value (see *Hellerstein v. Assessor, Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 274 (1975)), and was required to cause the State Board's assessments to conform to local assessment realities and maintain equality and uniformity between special franchises and other real property.

The legislative objective of uniformity is confirmed by the fact that the equalization rate applied today to special franchises is still calculated by reference to the level of assessment on all real property, not just special franchises. RPTL §1202(1)(a).

Nor does the distinction between personal and real, or tangible and intangible, property, make any difference. The state statute defines all parts of special franchises, whether personal, intangible or otherwise, as real property for tax purposes. RPTL §§102(12)(h) and (17). In both *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946), and *Brinkerhoff- Faris Co. v. Hill*, 281 U.S. 673 (1930), intangible personal property was assessed at higher rates than real property and tangible personal property. In both cases, state law required that all property be assessed

uniformly. In both cases, this Court held that the failure to grant taxpayers meaningful hearings on the merits with regard to their claims of intentional and systematic assessments at higher percentages of value than other property was a violation of the Due Process and Equal Protection Clauses. The fact that the states could have taxed personal property differently from real property, or tangible property differently from intangible property, was irrelevant because the states did not in fact do so. *Accord, Jamaica Water Supply Co. v. State Board, supra.*

The courts below have held that special franchises are to be assessed at the same percentage of value as all other real property, in furtherance of New York's legislative "objective of equality and uniformity". A-10. Thus, for purposes of *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), there is only one class of property in New York. See *Hillsborough Township v. Cromwell, supra; Brinkerhoff-Faris Co. v. Hill, supra.*

### B. Regardless of the Number of Classes, Taxpayers Have a Right to a Hearing.

In response to appellant's claim that, regardless of the number of classes, it has a right to a hearing on the issue of the State Board's failure to obey the statute, appellees urge that *Bi-Metallic Investment Co. v. State Board*, 239 U.S. 441 (1915), holds that equalization rates are "legislative facts" not subject to judicial review by individual taxpayers. Neither *Bi-Metallic* nor any other authority has ever held that equalization rates are "legislative facts", or that individual taxpayers may be denied a hearing with respect to claims that taxes were assessed against them unequally.

#### 1. *Bi-Metallic did not deny taxpayers a hearing on inequality of assessment.*

In *Bi- Metallic*, the board raised all assessed values in Denver by 40%. That action affected every taxpayer in the county equally. This Court ruled that individual taxpayers did not have a right to contest a county-wide change in the level of assessments. However, the taxpayer in *Bi-Metallic* still had a right to a hearing with respect to the specific assessment on its own property.

In that hearing, each taxpayer had the right to show that its "property has been valued at a rate different from that generally prevailing in the county . . . ." 239 U.S. at 444. In effect, in addition to the hearing to which it was entitled, the taxpayer in *Bi-Metallic* was seeking a second hearing, this time with respect to broad policy issues which had no bearing on the issue of individual equality. The only thing denied the taxpayer was a right to this additional hearing.

In *Bi-Metallic*, the Court distinguished its previous decision in *Londoner v. Denver*, 210 U.S. 373 (1908), on the grounds that, in *Bi-Metallic*, the state board was setting policy affecting everyone equally, whereas in *Londoner*, the question was the application of specific facts to a small number of individual taxpayers contesting their own assessments. This distinction, between judicial review of general policy matters affecting all taxpayers alike and the unequal apportionment of taxes to specific taxpayers, has been consistently recognized by subsequent cases and commentators. See, e.g., *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 244-245 (1973); *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283 (1984); Davis, Administrative Law, §12.2 (1978).

Appellant is uniquely and individually affected by the State Board's determination. In some of the jurisdictions involved, it may well be the only taxpayer so affected; in none of the tax units are there more than a handful of taxpayers similarly affected by these rates. *Londoner*, not *Bi-Metallic*, is the controlling case.

2. *The equalization rate is not a "legislative fact".*

Generally, legislative facts are matters that cannot be determined strictly on the basis of evidence, but reflect policy and other legislative-type decisions. Adjudicative facts do not require policy or judgment decisions: whether two times three equals six is an adjudicative fact, not a policy issue.

The Notes of this Court's Advisory Committee on Proposed Rule of Evidence 201 explain:

> Adjudicative facts are simply the facts of a particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

See, also, Davis, Administrative Law §12.3 (1978).

In *Bi-Metallic*, the state board decided what the new level of assessment should be – a legislative-type activity. In the present case, the State Board merely measures the levels already established by others (the assessors in the tax units), and it may neither set nor change those levels. Its function is solely one of discovering the facts and applying some plain mathematics, not making policy. If the raw data it obtains were given to a jury, the jury could use a hand calculator to determine the equalization rate. For example, if the evidence shows that the total of the values of all property in a municipality is $6,000,000, and the total assessments come to $2,000,000, the answer is one-third, or 33.3%. It is that simple.

The courts below ruled that the Legislature has mandated a policy of equality and uniformity of assessment. The Legislature has given the State Board instructions to implement this policy by applying a ratio which "as near as may be" is equal to the ratio between assessed and full values. As the lower court stated, "[T]he standard, 'as near as may be,' is clear." A-19-20. Given that "clear" standard, the State Board has no authority to substitute some other objective and rule that, as a "policy" matter, the number in the example, above, should be 50%, 100% or, as in one case, 166%, instead of 33.3%. Yet that is what it did herein. It systematically and intentionally ignored the legislative policy and violated the "clear" statutory standard.

3. *"Legislative facts" are not immune from judicial review.*

Even if the equalization rate were a legislative fact, appellant would still have a right to judicial review. No case holds that "legislative facts" may be created arbitrarily by an administrative

agency, without regard to that agency's compliance with the law. An administrative agency is not empowered to create legislative facts except to the extent authorized by the applicable statute, and affected citizens may always contest whether the agency has gone beyond its authority. See Koch, Administrative Law and Practice, 637 (1985):

> However, unrestricted use of legislative facts should not be permitted even in a judicial proceeding . . . Although legislative facts are not the kind of facts which can be proved in the traditional way, when they are central to the controversy, some technique should be used to test their validity; legislative facts that are critical to a decision should not enter the record without challenge.

To the same effect, see Davis, Administrative Law Treatise §§12.3, 12.8 and p. 428 (1978), and Notes of Advisory Committee on Proposed Rule of Evidence 201.

In summary, the New York Legislature amended the statute during the pendency of the proceedings below. As a result, at no time has appellant ever had the opportunity, administratively or judicially, to have its evidence on the inequality issues heard and considered on the merits. That is the essential ingredient of Due Process, and it has been denied. *Brinkerhoff-Faris Co. v. Hill, supra.*

## CONCLUSION

The motions to dismiss or affirm should be denied. The decision below should be summarily reversed or, alternatively, probable jurisdiction should be noted.

Respectfully submitted,

MARTIN B. COWAN
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5090

*Attorney for Appellant*

# APPENDIX

June 9, 1986

Honorable Thomas J. Lowery, Jr.
New York State Court of Claims
State Office Building
333 East Washington Street
Syracuse, New York 13202

Re: *Con Edison*

Dear Judge Lowery:

As we previously discussed, Con Edison has agreed to accept the valuations contained in the State Board appraisals introduced into evidence at trial for the 1974/75 tax year. Pursuant to our acceptance of the State Board values and a judgment concerning the assessments, I am enclosing a final judgment, broken down by municipality, setting forth the equalization rates actually used for the frozen base property and subsequent property and multiplying those rates by the full values set forth in the State Board's appraisal as separately determined for frozen base and subsequent property set forth in "Appraisal No. 2" of the State Board's appraisal.

I have sent a copy of this judgment to Peter Mafilios of the State Board, so that he may check the numbers for accuracy. However, I would note that the numbers are either from our frozen base stipulation in evidence or the State Board's Appraisal, Appendix IIIB.

We will also shortly be making a motion with respect to the constitutionality of RPTL § 744(1) as it affects the years 1978 through 1983, in order to preserve our rights to appeal. That motion will be made returnable on the first day of trial.

Finally, I am in receipt of Jack's letter concerning the New York City equalization rates. The relevant equalization rates are

contained, with the exception of the last two years, in the second frozen base stipulation. I believe that we can clarify all of the rates at the commencement of the trial.

Respectfully submitted,

Mark S. Tulis

MST:mm
Enclosure
cc: John P. MacArthur, Esq.
Melvin H. Osterman, Jr., Esq.
Lawrence Zimmerman, Esq.
Henry J. Smith, Esq.
Marvin S. Fink, Esq.
Mr. Peter Mafilios

At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the day of June 1986.

P R E S E N T:

HON. THOMAS J. LOWERY, JR.
Acting Supreme Court Justice.

----------X

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Petitioner,*

—against—

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

*Respondents,*

—and—

VILLAGE OF PLEASANTVILLE, et al.,

*Intervenors-Respondents.*

Index Nos.

11747/74 1555/75
1556/75 1557/75
1558/75 1559/75
1560/75 1561/75
1562/75 1563/75
1564/75 1565/75
1566/75 1567/75
1568/75 1569/75
1570/75 1571/75
1572/75 1573/75
1574/75 1575/75
1576/75 1577/75
1578/75 3026/75
3027/75

----------X

## FINAL JUDGMENT

Petitioner, Consolidated Edison Company of New York, Inc., having brought the above-entitled proceedings to reduce the assessments on its special franchise property located in the City

of New York and certain Westchester Municipalities in which it owns Special Franchise property for the 1974/75 tax year; and the issues in the proceedings having duly come on to be heard before the Honorable Thomas J. Lowery, Jr., Acting Supreme Court Justice at a Special Term of this Court, held at the State Office Building, 333 East Washington Street, Syracuse, New York; and

WHEREAS the proceedings were consolidated with proceedings for tax years 1975/76 through 1977/78 by order of the Supreme Court; and

WHEREAS, the Court having ruled on September 24, 1983 granting the motion of the respondents and intevenors-respondents granting them partial summary judgment against the petitioner dismissing the portions of the petitions seeking to establish that the assessments of petitioner's property were unequal in that the equalization rates used by the State Board of Equalization and Assessment ("SBEA") in determining the assessment did not represent the ratio between the assessed valuation and full valuation in the taxing units where petitioner's property was situated and further denying petitioner's cross-motion seeking to declare RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void; and

WHEREAS, petitioner has consented solely with respect to the above-entitled proceedings to accept as the full value of petitioner's property the values set forth in the appraisals of the SBEA submitted in evidence at trial for its "Frozen Base" and "Subsequent" property without admitting to the correctness of the SBEA's appraisals for other proceedings or years;

NOW, on motion of Rosenberg & Tulis, Special Counsel for petitioner, it is adjudged and decreed as follows:

1. The proceedings set forth above are hereby severed from the proceedings for tax years 1975/76 through 1977/78, and are separately consolidated for disposition.

2. The assessments before the Court determined by the SBEA and placed on the assessment rolls (totally both "Frozen Base" property and "Subsequent" property for 1974/75 tax roll were as follows:

| Municipality | Index No. | Total Assessment |
|---|---|---|
| Town of Stony Point | 11747/74 | $ 36,868,000 |
| NY County | 1555/75 | $492,315,289 |
| Town of Greenburgh | 1556/75 | $ 21,442,864 |
| Town of Harrison | 1557/75 | $ 4,072,853 |
| Town of Mt. Pleasant | 1558/75 | $ 3,966,368 |
| Town of New Castle | 1559/75 | $ 7,949,939 |
| Town of North Castle | 1560/75 | $ 1,430,290 |
| Town of Mamaroneck | 1561/75 | $ 3,787,892 |
| Town of Pelham | 1562/75 | $ 1,833,438 |
| Town of Rye | 1563/75 | $ 3,665,583 |
| Town of Scarsdale | 1564/75 | $ 2,813,501 |
| Town of Somers | 1565/75 | $ 55,378,000 |
| Town of Yorktown | 1566/75 | $ 1,848,765 |
| Village of Ardsley | 1567/75 | $ 1,489,733 |
| Town of Ossining | 1568/75 | $ 7,568,114 |
| Town of Eastchester | 1569/75 | $ 3,767,346 |
| Town of Cortlandt | 1570/75 | $ 2,874,994 |
| City of Rye | 1571/75 | $ 2,940,575 |
| City of Peekskill | 1572/75 | $ 3,826,884 |
| City of New Rochelle | 1573/75 | $ 12,825,570 |
| City of Mt. Vernon | 1574/75 | $ 11,072,822 |
| County of Richmond | 1575/75 | $ 43,818,589 |
| Queens County | 1576/75 | $314,480,859 |
| Kings County | 1577/75 | $291,677,785 |
| Bronx County | 1578/75 | $202,987,316 |
| Town of Bedford | 3026/75 | $ 5,430,975 |
| Village of Ossining | 3027/75 | $ 4,267,422 |

3. The full value of petitioner's property before equalization, as introduced into evidence by the SBEA, and as accepted solely for the purpose of these proceedings by petitioner is as follows:

| Municipality | Index No. | Frozen Base Full Value | Subsequent Property Full Value |
|---|---|---|---|
| Town of Stony Point | 11747/74 | $ -0- | $ 548,668 |
| NY County | 1555/75 | $ 155,817,086 | $ 840,522,342 |
| Town of Greenburgh | 1556/75 | $ 5,203,060 | $ 58,759,889 |
| Town of Harrison | 1557/75 | $ 1,143,586 | $ 22,142,490 |
| Town of Mt. Pleasant | 1558/75 | $ 1,683,607 | $ 22,106,451 |
| Town of New Castle | 1559/75 | $ 811,621 | $ 15,287,530 |
| Town of North Castle | 1560/75 | $ 250,015 | $ 7,105,474 |
| Town of Mamaroneck | 1561/75 | $ 1,925,727 | $ 10,863,766 |
| Town of Pelham | 1562/75 | $ 920,170 | $ 5,695,552 |
| Town of Rye | 1563/75 | $ 1,840,490 | $ 13,899,103 |
| Town of Scarsdale | 1564/75 | $ 1,635,251 | $ 10,126,186 |
| Town of Somers | 1565/75 | $ -0- | $ 362,518 |
| Town of Yorktown | 1566/75 | $ 153,637 | $ 10,511,629 |

| | | | |
|---|---|---|---|
| Village of Ardsley | 1567/75 | $ 271,598 | $ 2,554,613 |
| Town of Ossining | 1568/75 | $ 1,420,918 | $ 16,011,839 |
| Town of Eastchester | 1569/75 | $ 3,137,623 | $ 10,502,457 |
| Town of Cortlandt | 1570/75 | $ 744,172 | $ 20,007,997 |
| City of Rye | 1571/75 | $ 807,967 | $ 9,539,293 |
| City of Peekskill | 1572/75 | $ 744,734 | $ 11,582,033 |
| City of New Rochelle | 1573/75 | $ 3,416,444 | $ 27,089,494 |
| City of Mt. Vernon | 1574/75 | $ 4,813,621 | $ 29,925,009 |
| County of Richmond | 1575/75 | $ 2,462,731 | $ 110,406,677 |
| Queens County | 1576/75 | $85,470,399 | $577,583,353 |
| Kings County | 1577/75 | $89,948,367 | $ 505,261,426 |
| Bronx County | 1578/75 | $77,003,600 | $326,390,747 |
| Town of Bedford | 3026/75 | $ 277,777 | $ 5,927,812 |
| Village of Ossining | 3027/75 | $ 1,077,795 | $ 7,346,256 |

4. The equalization rates actually utilized by the SBEA in determining the assessments of petitioner's property and binding on this Court on the issue of inequality pursuant to RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, were as follows:

| Municipality | Index No. | Frozen Base Equalization Rate | Subsequent Property Equalization Rate |
|---|---|---|---|
| Town of Stony Point | 11747/74 | .75 | .130 |
| NY County | 1555/75 | 1.00 | .570 |
| Town of Greenburgh | 1556/75 | .9400 | .4400 |
| Town of Harrison | 1557/75 | .8800 | .2500 |
| Town of Mt. Pleasant | 1558/75 | .9300 | .2200 |
| Town of New Castle | 1559/75 | .8600 | .6800 |
| Town of North Castle | 1560/75 | .8200 | .2600 |
| Town of Mamaroneck | 1561/75 | .9500 | .3400 |
| Town of Pelham | 1562/75 | .9500 | .3300 |
| Town of Rye | 1563/75 | .9700 | .2800 |
| Town of Scarsdale | 1564/75 | .9600 | .2700 |
| Town of Somers | 1565/75 | .7500 | .2300 |
| Town of Yorktown | 1566/75 | .8600 | .2500 |

| | | | |
|---|---|---|---|
| Village of Ardsley | 1567/75 | .8800 | .6500 |
| Town of Ossining | 1568/75 | .9200 | .5800 |
| Town of Eastchester | 1569/75 | .9900 | .2800 |
| Town of Cortlandt | 1570/75 | .7600 | .2000 |
| City of Rye | 1571/75 | .9900 | .370 |
| City of Peekskill | 1572/75 | .9200 | .440 |
| City of New Rochelle | 1573/75 | 1.000 | .510 |
| City of Mt. Vernon | 1574/75 | 1.000 | .390 |
| Richmond County | 1575/75 | .9600 | .570 |
| Queens County | 1576/75 | .9300 | .570 |
| Kings County | 1577/75 | .9800 | .570 |
| Bronx County | 1578/75 | .9600 | .570 |
| Town of Bedford | 3026/75 | .9300 | 1.24 |
| Village of Ossining | 3027/75 | .9200 | .660 |

5. Pursuant to RPTL §606 the equalized value of petitioner's special franchise property for the above-entitled proceedings is determined by multiplying the full values set forth in Paragraph 2 above by the equalization rate set forth in Paragraph 3 above. Therefore, the equalized values of petitioner's property for the 1974/75 tax year were as follows:

| Municipality | Index No. | Frozen Base Equalized Value | Subsequent Property Equalized Value | Total Equalized Value |
|---|---|---|---|---|
| Town of Stony Point | 11747/74 | $ -0- | $ 71,326 | $ 71,326 |
| NY County | 1555/75 | $155,817,086 | $479,097,734 | $634,914,820 |
| Town of Greenburgh | 1556/75 | $ 4,890,876 | $ 25,854,351 | $ 30,745,227 |
| Town of Harrison | 1557/75 | $ 1,006,355 | $ 5,535,622 | $ 6,541,977 |
| Town of Mt. Pleasant | 1558/75 | $ 1,565,754 | $ 4,863,419 | $ 6,429,173 |
| Town of New Castle | 1559/75 | $ 697,994 | $ 10,395,520 | $ 11,093,514 |
| Town of North Castle | 1560/75 | $ 205,012 | $ 1,847,423 | $ 2,052,435 |
| Town of Mamaroneck | 1561/75 | $ 1,829,440 | $ 3,693,680 | $ 5,523,120 |
| Town of Pelham | 1562/75 | $ 874,161 | $ 1,879,532 | $ 2,753,693 |
| Town of Rye | 1563/75 | $ 1,785,275 | $ 3,891,748 | $ 5,677,023 |
| Town of Scarsdale | 1564/75 | $ 1,569,840 | $ 2,734,070 | $ 4,303,910 |
| Town of Somers | 1565/75 | $ -0- | $ 83,379 | $ 83,379 |
| Town of Yorktown | 1566/75 | $ 132,127 | $ 2,627,907 | $ 2,760,034 |

| | | | | |
|---|---|---|---|---|
| Village of Ardsley | 1567/75 | $ 239,006 | $ 1,660,498 | $ 1,899,504 |
| Town of Ossining | 1568/75 | $ 1,307,244 | $ 9,286,866 | $ 10,594,110 |
| Town of Eastchester | 1569/75 | $ 3,106,246 | $ 2,940,687 | $ 6,046,933 |
| Town of Cortlandt | 1570/75 | $ 565,570 | $ 4,001,599 | $ 4,567,169 |
| City of Rye | 1571/75 | $ 799,887 | $ 3,529,538 | $ 4,329,425 |
| City of Peekskill | 1572/75 | $ 685,155 | $ 5,096,094 | $ 5,781,249 |
| City of New Rochelle | 1573/75 | $ 3,416,444 | $ 13,815,641 | $ 17,232,085 |
| City of Mt. Vernon | 1574/75 | $ 4,813,621 | $ 11,670,753 | $ 16,484,374 |
| County of Richmond | 1575/75 | $ 2,364,221 | $ 62,931,805 | $ 65,296,026 |
| Queens County | 1576/75 | $ 79,487,471 | $ 329,222,511 | $ 408,709,982 |
| Kings County | 1577/75 | $ 88,149,399 | $ 287,999,012 | $ 376,148,411 |
| Bronx County | 1578/75 | $ 73,923,456 | $ 186,042,725 | $ 259,966,181 |
| Town of Bedford | 3026/75 | $ 258,332 | $ 7,350,486 | $ 7,608,818 |
| Village of Ossining | 3027/75 | $ 991,571 | $ 4,848,528 | $ 5,840,099 |

6. The Total Equalized Values for all of the within proceedings being greater than the Total Assessments in Paragraph 1, the assessments are hereby confirmed after a review of all the evidence in the record.

Judgment signed this day of June 1986.

Thomas J. Lowery, Jr.